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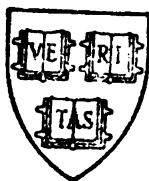
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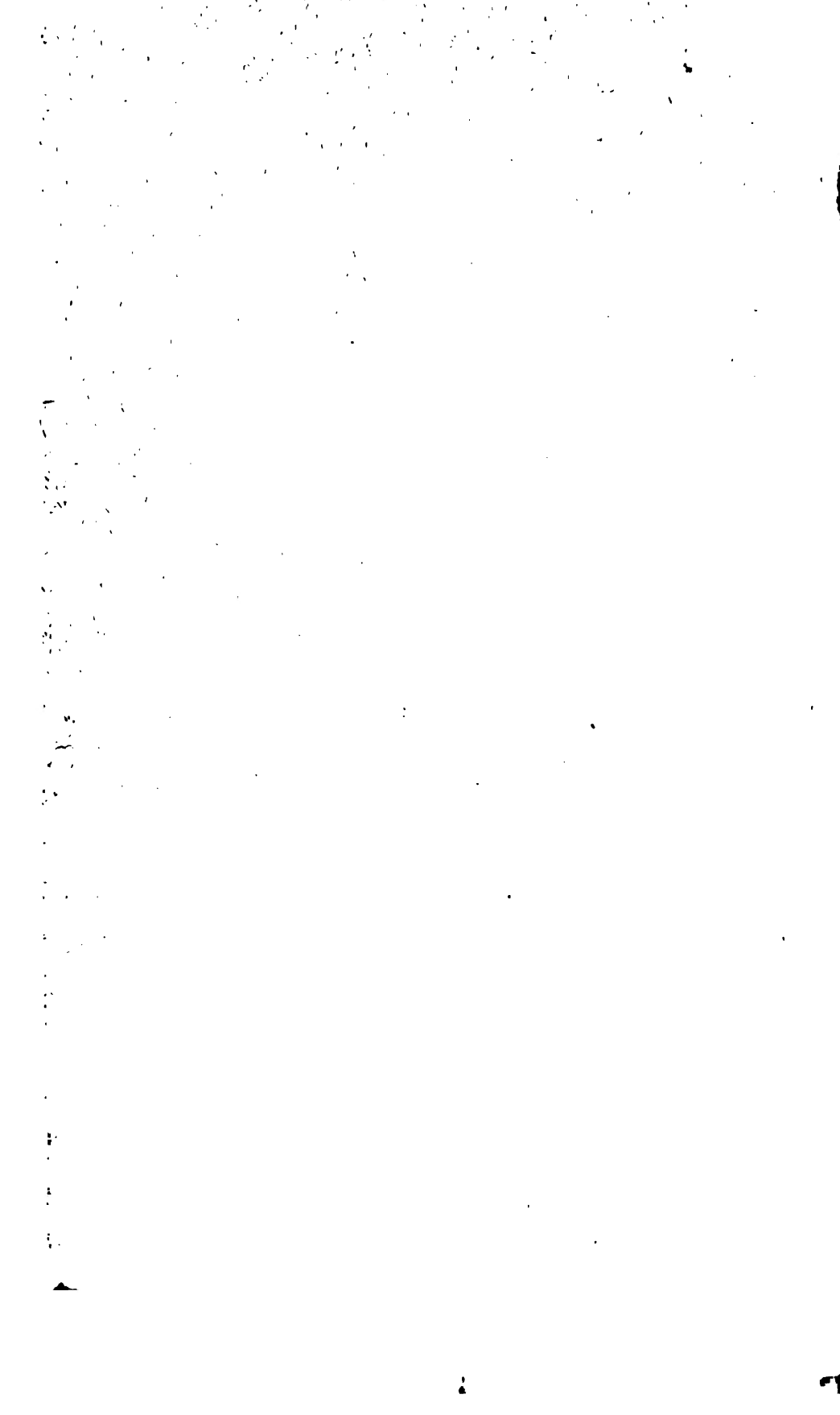
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OF

Cases in Law and Equity

IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW-YORK.



BY OLIVER L. BARBOUR,
Counsellor at Law.

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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK

WASHINGTON SPECIAL TERM, February, 1849. *Paige*,
Justice.

KIDD and others *vs.* DENNISON and others.

The doctrine of waste, as understood in England, is not applicable to a new and unsettled country. *Per* PAIGE, J.

Where the whole of a farm, when leased, is in a wild and uncultivated state, with the exception of a few acres, and for the use of it the lessee agrees to pay a rent, the parties will be held to have intended that the lessee should be at liberty to fell part of the timber in order to fit the land for cultivation.

But this right will not authorize the lessee to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value.

To what extent wood may be cut before the tenant is guilty of waste, must, in an action at law, be left to the sound discretion of the jury, under the direction of the court, as in other cases.

Where a tenant cuts trees upon the demised premises, not for the purpose of preparing the land for cultivation, but for the sake of the profit to be derived from a sale of the timber, he is guilty of waste.

Although a tenant for years may, from the commencement of his term, gradually clear up the woodland and prepare it for cultivation, yet he will not be permit-

Kidd v. Dennison.

ted, just before the expiration of his lease, to cut down timber, upon that pretext.

Relief is granted, in cases of that kind, upon the same principles on which an injunction is issued to stay what is called equitable waste.

Where a contract is made for the sale of land the vendor is, in equity, immediately deemed a trustee of the vendee of the real estate, and the vendee a trustee of the vendor, as to the purchase money. And the vendee is treated as the owner of the land, and the money is treated as the personal estate of the vendor.

IN EQUITY. The bill in this cause was filed to restrain the defendants from committing waste on a farm in Berlin, Rensselaer county, and for an account for waste already committed. The bill stated that Stephen Van Rensselaer leased the farm to Daniel Dennison for the term of 60 years, by an indenture of lease dated June 23d, 1791. The lease described the farm as an improved farm, and as containing 176 acres, and contained a covenant on the part of the lessee that he would not commit waste. The defendants claimed under the lessee. The plaintiffs, in their bill, stated that by a conveyance bearing date the 18th of September, 1846, the plaintiffs became seised and possessed of the estate in the reversion of the farm, and of the rents reserved in the lease; and they alleged that the defendants had been, and were, committing waste on the farm. The defendants, in their answer, denied that they had committed waste. They stated therein that at the time of the conveyance to the plaintiffs about 100 acres of the farm was covered with wood and timber; that the wood and timber did not constitute the principal value of the farm; that at the time the original lease was executed only about 25 acres of the farm had been cleared; that one of the objects of the lease was the clearing up and preparing the farm for cultivation; that the lessee and his assigns had cleared up and improved all but 100 acres of the farm, and that the farm would be increased in value by clearing the whole, except 25 or 30 acres to be reserved as a wood lot for the use of the farm. The defendants admitted that since the plaintiffs acquired the title to the reversion, and the rents, they had sold by contract the trees standing on two acres of the farm for the sum of \$10, and that a portion of the trees on the two acres had been cut and carried away. They alleged that the two acres would

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be increased in value by cutting off, and removing therefrom, the timber on the same. The defendants also admitted that they had, since the conveyance to the plaintiffs, cut from the farm 20 basswood trees, not exceeding in value \$15 or \$20. The defendants further alleged in their answer, that the plaintiffs, before they filed their bill, sold all their interest in the farm to one Samuel Hull, and insisted that the plaintiffs had no equitable interest in the premises, and had no right to ask for the relief prayed for in their bill. The proofs showed that Kidd, one of the plaintiffs, in his own name, on the 9th of July, 1847, gave to Hull a written contract for the sale of the farm to him, and in it agreed to convey the same to Hull by a warranty deed, on payment by Hull to him of a note for \$500 with interest, on the 1st day of November, 1847, and on the execution and delivery to him, by Hull, of the bond and a mortgage of the latter on the premises for \$1363, payable with interest. It was proved, by the admission of Kidd, that Hull had paid him \$500 on the contract for the sale of the farm. The defendants did not aver, in their answer, that they sold the timber on the two acres, and cut the basswood trees, for the purpose of preparing the land for cultivation. Several witnesses were examined, to the question whether the farm would be more or less valuable by clearing up and preparing for cultivation 50 or 60 acres of that part of it now covered with timber. On that question there was a conflict in the evidence.

H. Z. Hayner, for the plaintiffs.

J. Holmes, for the defendants.

PAIGE, J. The farm in question was undoubtedly leased to the lessee for agricultural purposes. The lease describes it as an improved farm. At the time the original lease was executed, in 1791, only 25 acres had been cleared. The lessee had no other way of enjoying the premises except by clearing and preparing them for cultivation. This could not be done without felling the timber. If he cut down the timber for the pur-

Kidd v. Dennison.

pose of preparing the land for cultivation, the severance of the trees from the freehold was not unlawful, and a sale of them after severance was a right incident to that of clearing the land for the purpose of agricultural improvement. The doctrine of waste, as understood in England, is not applicable to a new and unsettled country. At the date of the lease in this case, this was the condition of the country where the farm in question was situated. The whole of the farm, consisting of 276 acres, when originally leased was in a wild and uncultivated state, with the exception of a few acres; and for the use of it the lessee was to pay a rent. The parties must therefore have intended that the lessee should be at liberty to fell part of the timber to fit the land for cultivation. But this right did not authorize the lessee to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value. Rules of good husbandry require that the lessee or his assignees should preserve so much of the timber as is necessary to keep the buildings and fences in repair, and to supply the farm with fuel. If they do not leave sufficient timber for these purposes they will be guilty of waste. To what extent wood may be cut before the tenant is guilty of waste must, in an action at law, be left to the sound discretion of a jury, under the direction of the court, as in other cases. (*Jackson v. Brownson*, 7 John. 233, 235, per *Van Ness and Spencer, justices. Moores v. Wait*, 3 Wend. 107. *Cooper v. Stower*, 9 John. 333. 4 *Kent's Com.* 76. *Jackson v. Anchen*, 18 John. 431.) The original lessee and his assigns would doubtless have been justified in felling the timber on some 50 or 60 acres of the present woodland of the farm in question, for the purposes of cultivation, and agricultural improvement. But they had no right to cut down the timber merely for the purposes of sale and profit, without any reference to preparing the land for cultivation. (*Coke Lit.* 53 b.) I do not think that the principal question in this case is, whether the clearing up and preparing for cultivation 50 or 60 acres of the woodland of this farm would render the farm more or less valuable. For I believe that the original lessee, and his assigns, had a right, under the lease, to

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fell the timber on the land for the purpose of fitting it for cultivation, without being guilty of waste, provided they left a sufficient quantity of timber for all the purposes of the farm, although by so doing they diminished the value of the farm. One and the principal question which the case presents is, whether the timber which has been cut off by the defendants since the plaintiffs acquired title to the rents and reversion, was cut for the purpose of preparing the land for cultivation. The question is not whether the land would be rendered more or less valuable by stripping it of its wood and timber, and fitting it for cultivation; or whether according to the rules of good husbandry it would be proper to prepare for cultivation that part of the woodland on which the timber stood which has been felled. The felling, by a tenant, of any timber trees which by the custom of the country are considered as timber, and which are used for the erection or reparation of buildings, is waste. So the changing the course of husbandry, as, converting meadow land into arable, or *e converso*, is waste. So if the tenant materially changes the nature and character of the buildings, it is waste, although the value of the property should be enhanced by the alteration. (*Cruise, tit. Estate for life*, §§ 14, 15, 18 to 22, 26. 3 *Paige*, 259. *Coke Lat.* 53, a. b. 14 *Ves.* 526. 1 *John. Ch.* 435. 2 *Story's Eq. Jur.* § 913. 2 *Bouv. L. Dic.* 624, *Waste, and cases cited.*) In *Jackson v. Andrews*, (18 *John.* 433,) the court say that "a tenant cannot, under the pretence of advantage to the reversioners, change the nature of buildings, and many cases show that such changes, though beneficial, would be waste." The tenant has no authority to assume the right of judging what may be an improvement to the inheritance. He must confine himself to the conditions of his lease. In *Winship v. Pitts*, (3 *Paige*, 262,) the chancellor says a tenant has no right "to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term." In *Jackson v. Tibbits*, (3 *Wend.* 341,) the alterations did not amount to a change of the nature of the building. The remark of

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Marcy, J. in that case, that the acts done to constitute waste must in fact be prejudicial to the plaintiffs' estate in the premises, was *obiter*. The doctrine is stated in *Bacon's Ab. tit.*

Waste, (C.) as follows: "It has been held that a lessee or tenant cannot change the nature of the thing demised; though in some cases the alteration may be for the greater profit of the lessor. Thus if a lessee convert a corn mill into a fulling mill it is waste; although the conversion be for the lessor's advantage." (*London v. Creyme*, Cro. Jac. 182. *Cole v. Green*, 1 Lev. 309. *Bac. Ab. Waste*, C. 4.) So converting a meadow into an orchard is waste, although it increases the profit of the occupier. (*Bac. Ab. Waste*, (C).)

In *Livingston v. Reynolds*, (26 Wend. 122,) the president of the senate, in his opinion, says, "If it were really advantageous and desirable to reduce this woodland into cultivation, its being done by the tenant without the consent of the landlord, would injure the latter, in just so far as the value of the timber exceeded the expense of cutting it down and clearing the land. But injury is not, as has been said in this case, the test of waste, but disherison of him in remainder or reversion. The tenant in this cause has destroyed timber which he cannot reproduce, &c. This is disherison. The estate in remainder or reversion is wasted." The standing wood was cut, in the case of *Livingston v. Reynolds*, for the purpose of burning brick on the demised premises, to be sold. The wood was not cut down for the purpose of fitting the land for cultivation. The defendant in that case, in his answer, insisted that the land from which the wood was cut was excellent arable land, and more valuable when prepared for cultivation than it was when covered with timber; and that the wood cut was not needed to be left standing for the use of the farm. (*See the same case reported in 2 Hill*, 157.)

The defendants in this suit, in their answer, admit that they have sold the timber on two acres of the woodland of the farm, and have cut down about 20 basswood trees. But they do not allege that they sold the timber on the two acres, or cut the basswood trees, for the purpose of preparing the land for cultivation. And

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I think the proof very clearly shows that the object of the defendants in cutting the basswood trees and the spruce timber mentioned by the witnesses, was the profit to be derived from a sale thereof; and that that was also the object of the sale of the timber on the two acres. If this was the purpose which the defendants had in view in felling the basswood and spruce trees, and in selling the timber on the two acres, and not the preparation of the land for cultivation, then they have been guilty of waste, and are liable to the owners of the inheritance for the value of the timber cut, and for the injury to the land. (*Cruise, tit. Estate for Life*, § 49. 4 *Kent's Com.* 76.) Even if a tenant cuts down trees for the purpose of repairing the buildings on the demised premises, he is guilty of waste if he afterwards sells the trees, although subsequent to the sale he purchases back the trees, and employs them in the reparation of the buildings. It is the vendition which makes the cutting waste. So a tenant cannot sell trees, and with the money received on the sale cause the buildings to be repaired. (*Coke Litt.* 53, b.) If it was not too near the expiration of the lease, when the bill in this suit was filed, to enable the defendants to clear up the woodland, and put it in a proper condition for tillage, by the time the lease expired, certainly the unexpired term of the lease does not now afford sufficient time for this purpose. The court of chancery in England will not permit a tenant for years without impeachment of waste, to fell timber just before the expiration of his lease. In *Abraham v. Bull*, (2 *Freem.* 63,) a tenant without impeachment of waste began to fell the trees about half a year before the expiration of his term, and on application to the court of chancery an injunction was granted against him. (1 *Cruise's Dig. tit. 8, Estate for years, ch. 2, §§ 13, 14.*) The reason assigned in that case for granting the injunction was, that although the tenant might have felled trees, every year from the beginning of the term, which if he had done they would have been growing up gradually, yet it was unreasonable that he should let them grow until near the end of his term and then cut them all down. So in this case, although the tenant could, from the commencement of his lease, have gradu-

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ally cleared up the woodland and prepared it for cultivation, yet he ought not to be permitted, so near the expiration of his lease, to cut down the timber; because he could not put the land, by the time the lease expired, in a proper condition for tillage. Relief is granted, in a case of this kind, upon the same principle that an injunction is granted to stay what is called equitable waste. (2 *Story's Eq. Jur.* §§ 912, 913, 914, 915.)

The defendants insist that the plaintiffs have not such an interest in the premises as entitles them to the relief sought by this bill. It is contended that Samuel Hull, under his contract of sale from Kidd, has the equitable title to either the whole or to a moiety of the premises, and that he was therefore a necessary party to the plaintiffs' bill. I must infer from the allegations in the bill, and the admissions in the answers, that the plaintiffs purchased the rents reserved in the original lease, and the reversion in the demised premises, in their own right as individuals, and not as trustees. If the rents reserved, and the reversion, had been conveyed to them as trustees, Hull would have acquired no right or title to the farm under his contract from Kidd. In all cases of trust delegated for mere private purposes, the trustees, if alive, must all join in executing the trust; and if a conveyance is executed by only a part of the trustees, it is absolutely void. (*Sinclair v. Jackson*, 8 *Cowen*, 543, 553, 563, 582. 1 *Cruise, tit. 12, Trust, ch. 4, § 33.* 14 *John.* 553. 6 *Id.* 39.) I must also infer from the bill and answers that the plaintiffs, under their deed of the 18th of September, 1846, acquired both the legal and beneficial interest in the reversion of the farm in question. If so, Kidd and Lansing were tenants in common, and Kidd had a right, without the concurrence of Lansing, to sell his moiety. Samuel Hull, therefore, under his contract with Kidd, acquired the equitable title to a moiety of the premises. He can compel Kidd to specifically perform the contract, as to the moiety of the farm owned by him. Where a vendor is unable to perform his contract in full, although he cannot compel the purchaser to accept a partial performance, yet the purchaser may, if he elects to accept a partial performance, compel the vendor to perform his

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agreement as to the part of the land to which he has a good title. (5 *Paige*, 307, 308. 8 *Id.* 474.) Where a contract is made for the sale of land, the vendor is, in equity, immediately deemed a trustee of the vendee of the real estate, and the vendee a trustee of the vendor, as to the purchase money. And the vendee is treated as the owner of the land, and the money is treated as the personal estate of the vendor. (*Swartwout v. Burr*, 1 *Barb. S. C. Rep.* 499. 2 *Story's Eq. Jur.* § 1212. 6 *John. Ch.* 402, 405. 3 *Id.* 316.) Kidd, upon the pleadings and proofs in this case, must be regarded as the trustee of Hull as to a moiety of the farm. And Hull, under his contract from Kidd, is entitled to a moiety of the damages which the defendants are liable to pay to the owners of the inheritance, for the waste committed by them since the date of the contract, or at least since November 1st, 1847, when Kidd was to give Hull a deed. The question then arises, was Hull a necessary party to the suit? He is interested in every part of the relief asked for in the bill; in the account sought to be taken for waste heretofore committed; in the prevention of future waste; and in restraining the defendant from removing the timber already cut. The general rule is that all persons materially interested in the subject matter of the suit ought to be made parties; and that *cestuis que trust*, as well as trustees, should be brought before the court, so as to make the performance of the decree safe to those who are compelled to obey it, and to prevent the necessity of the defendant's litigating the same question again, with other parties. The only exception to the general rule that the *cestui que trust* must be made a party to a suit brought by a trustee, appears to be the case of assignees, or the trustees of a fund for the benefit of creditors, who are suing for the protection of the fund, or to collect moneys due to the fund, from third persons. (*Christie v. Herrick*, 1 *Barb. Ch. Rep.* 260, *per Chancellor Walworth*.) Hull does not come within this exception to the general rule. He was undoubtedly a necessary party to the suit. *Non constat*, he has fully performed his contract with Kidd for the purchase of the farm, and is now entitled to a deed thereof. Kidd, if he has not conveyed, is a proper if not a

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necessary party to the bill. The legal title remains in him, which he holds in trust for Hull. The defendants do not specifically take the objection that Hull is a necessary party; but they allege that both the plaintiffs have transferred their interest in the premises to Hull, and that they are not therefore entitled to the relief asked for in the bill. Where the defendant takes the objection, by plea, answer, or demurrer, of the want of proper parties, and the plaintiff neglects to amend his bill by bringing in the necessary parties, it is in the discretion of the court, at the hearing, either to permit the cause to stand over upon payment of costs, to enable the plaintiff to bring the proper parties before the court, or to dismiss the bill with costs. (4 *Paige*, 64.) I will in this case adopt the former alternative, and direct the cause to stand over, to enable the plaintiffs to amend their bill by making Hull a party thereto. As the proofs already taken in the cause will be as material and relevant after Hull is made a party as they are now, I will only charge the plaintiffs with the costs of the hearing and of the defendants' further answer to the amended bill. The bill does not expressly charge that the defendants threaten to commit future waste. This charge may perhaps be implied from the allegation that the defendants are cutting the timber trees from off the farm. This may be sufficient, as the defendants do not deny, in their answers, that they intend to continue cutting down the timber. An injunction will not be granted on a vague apprehension of an intention to commit waste. (11 *Ves.* 54.) The right to an account for waste already committed is incidental only to the right to file a bill to prevent future waste. A bill will not lie merely for an account for waste; as the plaintiff has an ample remedy for such injury at law. And where a bill is filed to prevent future waste, and also to prevent the removal of timber already cut, the court will not, unless under very special circumstances, grant an injunction to prevent the removal of the timber already cut. (*Watson v. Hunter*, 5 *John. Ch. Rep.* 168. 4 *How. Pr. Rep.* 175.)

This cause must stand over, to enable the plaintiffs to amend their bill by making Samuel Hull a party thereto, on payment to the defendants of their costs of the hearing and of their fur-

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ther answer to the amended bill. And if the plaintiffs neglect, within forty days after notice of the order to be entered on this decision, to amend their bill by making Hull a party thereto, and to pay the costs aforesaid, their bill is to be dismissed with costs.

SCHENECTADY SPECIAL TERM, February, 1849. *Paige*,
Justice.

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A judgment or other security may be taken and held for future responsibilities and advances to the extent of the amount of the judgment or security. But to enable a creditor thus to hold a judgment or other security it must be a part of the original agreement that the judgment shall be a security for such responsibilities and advances.

It cannot, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties.

Where a mortgage or judgment is taken for future responsibilities or advances, *it seems* that it will not cover further responsibilities or advances, as against an incumbrance of a third person obtained intermediate the judgment or mortgage and such further responsibilities and advances.

Where a bond and warrant of attorney are given as a security for existing and future responsibilities, to continue until the judgment to be entered up on such bond and warrant shall be cancelled of record, the creditor has a right to hold such judgment as a security for any future responsibility assumed by him, until the same is cancelled of record. Until it is thus cancelled, the judgment, under such agreement, does not become *functus officio*, although there may have been a time, subsequent to the giving of the bond and warrant, when there was no liability on the part of the creditor, and no indebtedness from the debtor, to him. The supreme court, as a court of law, has always exercised an equitable jurisdiction over judgments entered up by confession, on bonds and warrants of attorney. And upon an application for relief, in such cases, the court will receive parol evidence in relation to the extent and object of the bond and warrant, and the consideration thereof.

Taking a bond and warrant of attorney from one of two partners, for a partnership debt, extinguishes the liability of the other copartner. The debt, as a partnership debt, becomes merged in the judgment; and the individual liability of

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the judgment debtor is substituted in the place of the joint liability of both partners.

Where real estate was originally purchased by one of two partners, and paid for out of his individual funds, and the only interest of the partnership in the premises is on account of improvements made thereon with the funds of the partnership, the actual interest, in the premises, of the partner advancing the purchase money—at least his individual interest therein—is liable to be sold on execution against him.

But it seems that the partnership creditors have a claim, in equity, to have the whole value of the improvements applied in payment of their debts, in preference to the separate creditors of the individual partners.

And the equitable interest in such improvements, chargeable with the debts of the partnership, will pass under an assignment made by the copartners for the benefit of the partnership creditors; and upon such equitable interest a judgment obtained by a separate creditor against the copartner who purchased the real estate will not, as against the partnership creditors, be a lien.

If improvements are made upon such property, with the partnership funds, intermediate the giving of a judgment by one of the partners as a security for future responsibilities, and the incurring of such responsibilities by the judgment creditor, the equitable interest of the other copartner to be reimbursed his share of the partnership funds applied to the making of such improvements, is prior in point of time to the lien of the judgment; upon the principle that an incumbrance which intervenes between a judgment and further advances takes priority over the latter.

The lien of a judgment does not attach, in equity, upon the mere legal title to land, existing in the defendant, when the equitable title is in a third person.

And if a purchaser under the judgment has notice of the equitable title, before his purchase and the actual payment of the money, he cannot protect himself as a bona fide purchaser.

THIS was a motion by the assignees of Loucks & Gray for a rule to compel William S. Bellinger, the owner of the judgment in this suit, to enter a satisfaction thereof, and to direct the sheriff to sell, on the execution issued upon the judgment, the individual property of the defendant, and not to sell the premises secondly described in the sheriff's advertisement of sale. The defendant George P. Loucks, and Morgan Gray, were general partners, doing business under the name of Loucks & Gray. On the 4th of September, 1848, they failed, and made an assignment of all their real and personal estate to T. O. Bailey and P. L. Loucks, in trust, for the benefit of the creditors of Loucks & Gray, and of George P. Loucks. The judgment in this suit was docketed on the 11th of July, 1846. It was enter-

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ed up on the 8th of July, 1846, on a bond conditioned for the payment of \$2000 and a warrant of attorney. The bond and warrant were in the usual form. They were given by George P. Loucks, the defendant, on the 1st of July, 1846, to the plaintiff, under an agreement that they were to be held by him as a continuing security for all endorsements theretofore made and thereafter to be made by the plaintiff for the defendant and for the firm of Loucks & Gray, until the judgment to be entered up on such bond and warrant should be cancelled of record. The plaintiff, under this agreement, continued from time to time to endorse for Loucks & Gray until the 30th of June, 1848, when he endorsed a draft for Loucks & Gray for \$2000; which he afterwards became liable to pay, and actually did pay. The plaintiff, on the 19th of October, 1848, issued an execution on the judgment, to the sheriff of the county of Montgomery. On the 8th of January the plaintiff, for the sum of \$2070,59, assigned the judgment to George Yost and William I. Bellinger. And Yost assigned the same to Bellinger, who was a creditor of Loucks & Gray. The assigned property was not sufficient to pay all the debts provided for in the assignment. The sheriff had advertised the real estate of the defendant for sale. The premises secondly described in his advertisement of sale were originally purchased by the defendant with his individual funds, but improvements had been made thereon by the firm of Loucks & Gray, with the funds of the partnership, and for the purposes of the partnership.

T. B. Mitchell, for the assignees of Loucks & Gray, &c.

D. G. Lobdell, for William I. Bellinger.

PAIGE, J. A judgment or other security may be taken and held for future responsibilities and advances, to the extent of the amount of the judgment or security. But to enable a creditor to hold a judgment or other security for future responsibilities and advances, it must be a part of the original agreement that the judgment, or security, should be a security for such

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responsibilities and advances. (*Brinckerhoof v. Marvin*, 5 *John. Ch.* 325; *Livingston v. McInlay*, 16 *John.* 165; *Morrell v. Jenkins*, 5 *Cowen*, 441.) It cannot, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties. (*Troup v. Wood*, 4 *John. Ch.* 246.) A mortgage or judgment once paid cannot be restored or revived by any subsequent agreement of the parties. (*Id. Marvin v. Vedder*, 5 *Cowen*, 671. *De La Vergne v. Evertson*, 1 *Paige*, 181.) And a mortgage, or a judgment entered upon a bond and warrant of attorney, cannot be enlarged beyond the amount of the mortgage, or the condition of the bond, and held as a security for moneys not mentioned therein, as against a subsequent incumbrancer. (*St. Andrew's Church v. Tompkins*, 7 *John. Ch.* 14. *Bergen v. Boerum*, 2 *Caines*, 256.) And where a mortgage or judgment is taken for future responsibilities or advances, it seems that it will not cover further responsibilities or advances, as against an incumbrance of a third person obtained intermediate the judgment or mortgage and such further responsibilities and advances. (5 *John. Ch.* 326.)

In this case the bond and warrant of attorney of the defendant Geo. P. Loucks was given to Lewis Averill as a continuing security for all endorsements theretofore made and thereafter to be made by Averill for the defendant, and for the firm of Loucks & Gray, until the judgment to be entered up on such bond and warrant of attorney should be cancelled of record. The endorsement for which the judgment is sought to be held as security was made on the 30th of June, 1848, prior to the failure of Loucks & Gray, and prior to their assignment to Bailey and P. I. Loucks. On the 30th of June, 1848, Averill endorsed a draft for Loucks & Gray for \$2000, which he afterwards became liable to pay, and did actually pay. Upon the cases cited I think Averill had a right to hold the judgment as security for his liability on account of this endorsement. It was a part of the original agreement that Averill should hold the judgment as a security for subsequent endorsements. The cases in relation to a judgment or mortgage being held to meet or cover new

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and distinct engagements subsequently entered into by the parties, are not applicable. I do not regard as of any importance, (so far as the subsisting validity of the judgment is concerned,) the fact that there may have been a time between the giving of the bond and warrant of attorney and the 30th of June, 1848, when there was no endorsement of Averill for Loucks & Gray, or for Loucks, and no indebtedness from them, or either of them, to him. Averill had a right, under the original agreement, to hold the judgment as his security for any future endorsement made by him for Loucks & Gray, or for Loucks, until the judgment was cancelled of record. Under this agreement the judgment did not become *functus officio* until it was cancelled of record.

It is objected by the counsel of the assignees of Loucks & Gray, that parol evidence is inadmissible to vary the terms of the bond and warrant of attorney. The assignees themselves first resorted to parol evidence to show the extent and object of the bond and warrant. Besides, one of the assignees states, in his affidavit, that the bond and warrant of attorney were given to indemnify Averill against certain endorsements previously made by him, and that the notes so endorsed had been paid and taken up by Geo. P. Loucks. Bellinger, the present owner of the judgment, certainly had a right to rebut or qualify this parol evidence, by evidence of the same character. If parol evidence is to be excluded on both sides, then no ground remains for the application to have the judgment satisfied of record. Without this parol evidence the bond must be taken to be as it purports, on its face, an ordinary bond for the payment of money. And it is not pretended that Geo. P. Loucks has paid to Averill any part of the money stipulated to be paid to him, by the condition of the bond. But I apprehend that upon this application parol evidence is admissible to explain the extent and object of the bond. The application is to the equitable jurisdiction of the court. This court, as a court of law, has always exercised an equitable jurisdiction over judgments entered up by confession, on bond and warrant of attorney. (*Frasier v. Frasier*, 9 John. 80.) And it has generally been found necessary, on ap-

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plication for relief in such cases, both at law and in equity, to receive parol evidence in relation to the extent and object of the bond and warrant, and the consideration thereof. And I am not aware of a case where such evidence has been rejected, on a summary application to the equitable powers of this court, or on a bill filed in a court of equity, for relief. In *Livingston v. McInlay*, (16 John. 165,) it was agreed, at the time the bond was given, that further advances should be made by the plaintiff to the defendant. This agreement formed no part of the condition of the bond. On an application to have the amount of the further advances deducted from the amount to be levied on the execution issued upon the judgment entered up on the bond, parol evidence of such agreement was received without objection.

It is an established rule in chancery, that parol evidence is admissible to show that a deed absolute on its face was intended by the parties as a mortgage. (1 Paige, 206. 2 Cowen, 324. 1 John. Ch. Rep. 594.) In *Moses v. Murgatroyd*, (1 John. Ch. Rep. 118,) where an assignment of personal property, general and absolute on its face, was admitted to have been given as a security or indemnity merely, it was held by Chancellor Kent that parol evidence was admissible to explain the extent and object of the assignment. It has frequently been held that an assignment of a chose in action, although absolute and under seal, may be shown by parol evidence to have been given and intended as a mere mortgage or collateral security. (20 Wend. 632. 1 Hill, 632.)

But the parol evidence objected to, relates to the consideration of the bond and warrant of attorney. And since the decision of *McCrea v. Purmort*, (16 Wend. 460,) in the court of errors, the utmost latitude of inquiry into the consideration of deeds and other written contracts has been allowed. The decision in that case authorizes the reception of parol evidence, not only to show another consideration consistent with the one expressed, but also a different consideration, one inconsistent with the consideration expressed in the deed or contract. The rule adopted in the case of *McCrea v. Purmort*, allows the consideration clause of a deed or other written contract, in all cases, to be ex-

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plained or contradicted by parol evidence, where the object is not to defeat the deed or contract, or to change their legal effect. Under the revised statutes, the consideration of sealed instruments may be inquired into, to the same extent as if they were unsealed. (2 R. S. 406.)

Where there is no change of the parties to a suit, no person but the defendant can take the objection that the execution did not issue until after the expiration of two years, without a revival of the judgment by scire facias. In this case the defendant consented that the execution might issue without such revival. (1 Cow. 739. *Gra. Pr.* 350, 2d ed.)

Taking the bond and warrant of attorney from George P. Loucks, and entering up a judgment thereon, extinguished the liability of Gray, the copartner of Loucks, to Averill. The debt, as a partnership debt, became merged in the judgment against Loucks; and the individual liability of Loucks was substituted in place of the joint liability of both partners. (5 *Hill*, 135, 82, 85. 1 *Denio*, 225. 18 *John*. 459, 481, 2, 3.) Loucks being thus made individually liable to Averill, he has a claim on the partnership property for the amount of the judgment against him, which he is entitled to have paid out of the surplus, if any remains after the payment of all the partnership creditors. (4 *John*. Ch. 522. *Story on Part.* § 93, note.) Under the decision in *Coles v. Coles*, (15 *John*. 161,) partners, in the absence of special covenants between them, hold real estate, purchased with partnership funds, and for the purposes of the partnership, as tenants in common and not as partners; and the rules relative to partnerships do not apply. This decision, Chancellor Kent says, (3 *Kent's Com.* 37,) goes to the entire subversion of the equity doctrine now prevalent in England relative to real estate belonging to a partnership. According to that doctrine, the real estate belonging to a copartnership is, in equity, treated as personal estate, and is disposable and distributable as personal estate; and the persons in whom the legal estate is vested are considered as trustees for the partnership. (*Story on Part.* §§ 92, 93. 3 *Kent's Com.* 37. *Story's Eq. Jur.* § 674.)

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The supreme court of Massachusetts, in *Goodwin v. Richardson*, (11 *Mass. Rep.* 469,) seemed to consider that partners purchasing real estate with their joint funds and taking one conveyance to themselves as tenants in common, would hold their undivided moieties by separate and independent titles; and that the same would go, on the insolvency of the firm, or on the death of either partner, to pay their respective creditors at large. But the decision in that case was probably controlled by a local statute which gave the creditors of the copartnership the same remedy against the separate estate of a deceased copartner, as his individual creditors had. If the doctrine as laid down in *Coles v. Coles* is to be regarded as the law of the state, then a separate judgment creditor of one of several partners, would have a right to sell, on his judgment, the undivided share of such partner in real estate held by all the partners for partnership purposes, although the personal property of the partnership was insufficient to pay all the partnership debts. (*See note at the end of this opinion.*)

The defendant George P. Loucks, in his affidavit, states that the premises secondly described in the sheriff's advertisement were purchased by him, and that all the payments which had been made on account of the purchase money, were made by him, out of his individual funds, and that the only interest of Loucks & Gray in the premises was on account of improvements made thereon with the partnership funds. The actual interest of George P. Loucks in these premises, at least his individual interest therein, is liable to be sold on the execution against him. Gray, as one of the partners of that firm, has an equitable interest in such improvements, which doubtless passed under the assignment to Bailey and P. I. Loucks in trust for the partnership creditors of Loucks & Gray. Upon this equitable interest the judgment of Averill is no lien. The lien of a judgment does not attach, in equity, upon the mere legal title to land existing in the defendant, when the equitable title is in a third person. And if a purchaser under the judgment has notice of the equitable title, before his purchase and the actual payment of the purchase money, he cannot protect himself as a bona fide

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purchaser. (*Ells v. Tousley*, 1 *Paige*, 280.) In chancery, the general lien of a judgment is controlled by equity, so as to protect the rights of those who are entitled to an equitable interest in the lands, or in the proceeds thereof. (*White v. Carpenter*, 2 *Paige*, 217.) And the lien will be limited to the actual interest which the judgment debtor has in the estate. (*Keirsted v. Avery*, 4 *Paige*, 9.) Judgment creditors have no preference over prior equitable claims against the estate of the debtor. And the purchaser under a judgment, in equity, takes the land subject to an equitable claim, prior in point of time to the judgment, of which he had notice at, or prior to the sheriff's sale. (*Sanford v. McLean*, 3 *Paige*, 117. 2 *Id.* 586.) The affidavits do not show when the premises secondly described in the sheriff's advertisement were purchased by George P. Loucks, nor when the improvements were made thereon, whether before or after the judgment of Averill was docketed, or before or after the 30th of June, 1848, when Averill endorsed the draft of \$2000, for which the judgment is now sought to be held as security. If the improvements were made with the partnership funds previous to the endorsement of Averill, on the 30th of June, 1848, the equitable interest of Gray will be prior in point of time, to the lien of the judgment, upon the principle that an incumbrance which intervenes a judgment, and further advances takes priority over the latter. I do not intend to express an opinion that Gray, or his assignees, will have no claim in equity for Gray's share of the improvements, even if they were made after the endorsement by Averill of the \$2000 draft on the 30th of June, 1848. Nor do I wish to be understood as deciding definitively, that the partnership creditors of Loucks & Gray have no claims in equity, to have the whole value of the improvements made on the premises secondly described in the sheriff's advertisement, applied in payment of their debts, in preference to the judgment of Averill. I shall leave that question to be settled in some proceeding, other than on a summary application to the court by motion. If the assignees of Loucks & Gray elect to allow the sale under the judgment to proceed, they can give notice, at the sheriff's sale, to the purchaser, of

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their claim as assignees, to the equitable interest of Gray and of the firm of Loucks & Gray in the improvements made with the partnership funds; and the purchaser will, in that event, take subject to whatever equitable interest they have, as such assignees, in the premises.

Bellinger has a right to sell, under his judgment, all the individual interest of George P. Loucks in these premises.

The motion must be denied, but without costs; with liberty to the assignees of Loucks & Gray to apply for relief in relation to their equitable interest as such assignees, in the premises secondly described in the sheriff's advertisement, in a suit to be commenced by them for that purpose.

Note. In *Buchan v. Sumner*, (9 Barb. Ch. Rep. 167,) Chancellor Walworth held that real estate purchased with partnership funds, or for the use of the firm, is in equity chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another upon the winding up of the affairs of the firm; and that the separate creditors of the individual partners have no equitable right to any part of such real estate until the debts of the firm are provided for, and the rights of the partners, as between themselves, are fully protected. This decision was overlooked when the foregoing opinion was written. It seems to settle the question, as to the right of the partnership creditors of Loucks & Gray to have the whole value of the improvements made on the premises secondly described in the sheriff's advertisement applied in payment of their debts in preference to the separate creditors of either Loucks or Gray.

DELAWARE GENERAL TERM, March, 1849. *H. Gray, Mason, and Morehouse*, Justices.

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Where a defendant presents a demand as a set-off to the plaintiff's claim, which demand is legal, and proper to be allowed, if proved, and the court or jury pass upon it, and disallow it, such demand cannot be set off in another suit between the same parties.

The former verdict, or judgment, is conclusive, unless it is shown that the reject-

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ed claim was of such a nature that it could not legally have been allowed, in the previous suit. If it appears affirmatively that the court, or jury, could not legally have allowed the claim as a set-off, the case will be taken out of the operation of the rule.

THIS case came before the court on an appeal from a judgment of the Cortland county court, reversing the judgment of a justice in favor of the appellant for \$21,94 damages and costs. The declaration before the justice was upon a promissory note as follows:

“South Cortland, Jan’y 22, 1842.

For value received, I promise to pay Franklin Hatch or bearer thirty-five dollars and interest the first day of January next.

OZIAS C. BENTON.”

On the back of the note were these endorsements: “Received on the within at date two dollars.” “Rec’d February 21, 1843, on the within, twenty dollars.” The defendant produced a receipt in the following words: “Cortland Village, February 12, 1843. Received of O. C. Benton twenty dollars to apply on his note.

FRANKLIN HATCH.”

In July, 1843, Hatch sued Benton and Jonas Wood upon a note made by them as follows:

“South Cortland, Oct. 26, 1842.

Thirty days after date we promise to pay Franklin Hatch or bearer forty-nine dollars and interest, for value received.

O. C. BENTON.

J. WOOD.”

There was endorsed a payment of \$30 received December 29th. On the trial, the defendant produced and proved the receipt for \$20. The justice gave judgment for the plaintiff for the balance due on the note, \$20,34, which, by computation, excluded the receipt as payment or set-off on the joint note. James S. Leach appeared as attorney for the defendant on both occasions in the justice’s court, and he testified on the last trial that Benton left the receipt with him to apply on the note Hatch had against him and Wood; that he presented the receipt to Hatch, and he claimed that it was to apply on a note

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he held against Benton individually. Benton insisted he had paid Hatch \$40, which more than satisfied the individual note, and that the balance was to apply on the company note; that this conversation about the receipt was at the time the suit of Hatch against Benton and Wood was adjourned. It did not appear affirmatively that any specific objection was made to the admissibility or proof of the receipt, on the trial. Upon the trial before the justice, between Hatch and Benton, the allowance of the receipt was objected to, upon the ground that it had been submitted in the former suit; and the justice disallowed it for that reason, and gave the judgment before mentioned, which was reversed by the county court. The only question in the case was whether the justice erred in disallowing that receipt.

H. Ballard, for the appellant.

Leal & Brown, for the respondents.

By the Court, MOREHOUSE, J. The record contains the proceedings before the justices of the peace respectively in both of the suits. On the trial of the first cause, the plaintiff proved the execution of the note, and that the defendants were partners, and rested. Then follows, "James S. Leach, a witness sworn on the part of the defendant, produced a receipt signed by Franklin Hatch, for twenty dollars, dated Feb'y 12, 1843; signature proved by the witness." *It does not appear whether it was objected to or not.* It is evident that it was not allowed. The witness produced the receipt, and proved the signature, and it would be hyper-technical to assume that it was not offered as a set-off and read in evidence. The justice certifies that he returns all the evidence, and that after hearing the proofs and *allegations* of the parties he rendered judgment. This part of the return may be merely formal. There may have been no pleading, affirmation, or assertion in the nature of summing up the cause. If there was, the receipt in question must have been the subject of the allegations. Upon the next trial, Mr. Leach is the only witness to establish the claims of the par-

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ties. He testifies that when the first suit was tried, four years before, he presented the receipt as a set-off in that suit, and that Hatch claimed that the receipt was to apply on a note he held against Benton individually. I understand the witness to fix this conversation at the time of joining issue in the suit. Hatch, at that time, was not ignorant of his right to exclude the receipt. Whether that conversation passed in the hearing of the justice or not does not appear. It is not unworthy of notice, that Mr. Leach, the attorney of Benton, is silent as to whether the receipt, proved as stated in the return, was submitted to the justice as matter of set-off, and whether it was or was not objected to. Perhaps it was incumbent upon the plaintiff, by a cross-examination of him, to show affirmatively that he objected to its introduction. It would not be, to show on the second trial that it was not submitted, if the return does not show that fact, at least *prima facie*. The receipt shows upon its face that it was a demand which could not be set off, as matter of right. There were two defendants, and it was not due to them jointly. Secondly, it created no demand against Hatch; it was a *payment* of twenty dollars, specifically appropriated by the parties as so much, upon Benton's note, and was not properly a set-off. (10 *Wend.* 555. 14 *id.* 68. 9 *Cowen*, 420.) The important inquiry in the case recurs, What is the rule of law in a cause thus circumstanced? In seeking an answer to that question I do not propose to reconcile the cases stating the rule and originating exceptions, or to harmonize the decisions referred to by counsel, and a multitude of others, apparently conflicting. In *King v. Fuller*, (3 *Caines*, 152,) it was held, as a general proposition, that where a claim, whether it can be legally set off or not, is pleaded and not objected to, and the jury pass upon it, the consent of parties thus to be implied will take away the error, and it then becomes a bar to a subsequent suit. *Brockway v. Kinney*, (2 *John*. 210,) was a case where the plaintiff declared on a note, and also for work and labor. The jury found for the plaintiff to the amount of the note, and he sued again for the work and labor. It appeared that he did not abandon the charge on the former trial, and that the charge went to the jury and took

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its chance. The verdict was considered conclusive. The court say if the plaintiff did not choose to hazard a verdict he should have entered a nolle prosequi on the charge, or consented to a nonsuit. *Lawrence v. Houghton*, (5 John. 129,) establishes that a former suit in which the party ought to have set off his demand, if there be a recovery against him, is a bar, notwithstanding the set-off was offered and overruled. *Bull v. Hopkins*, (7 John. 22,) would seem to be an exception. Hopkins sued Bull, and declared for money paid and laid out for the use of the defendant. The defendant pleaded non-assumpsit, and that the same demand had been pleaded by way of set-off to a suit brought by Bull against Hopkins. It appeared that the set-off had been exhibited at the former trial, and was proved, and rejected by the jury because it was for a demand not then due. The court held that as it was for a demand which accrued subsequent to the former trial, it could not have been legally set off on the former trial, and that therefore that trial was no bar. It does not appear that any objection was made to proving the set-off. *Irwin v. Knox*, (10 John. 365,) decides that a demand exhibited to a jury in a former suit, and not abandoned by the plaintiff before or at the trial, but submitted to their consideration and disallowed for want of sufficient proof, is barred. It is a reiteration of the principle in *Brockway v. Kinney*, and rests upon the familiar maxim *nemo debet bis vexari*. In *Sherman v. Crosby*, (11 John. 70,) what was apparently the separate debt of one defendant was offered to be set off against the joint debt of both. The plaintiff objected, upon the ground of the insufficiency of the proof only, and on its being ruled against him submitted to a nonsuit. On a motion to set aside the nonsuit the court said it was too late to object that it was the separate debt of one defendant, because if the objection had been made at the time, the defendants might have shown that the payment by T. Crosby was in fact made by him and his co-defendant as partners, and out of the partnership funds. *Platner v. Best*, (11 John. 530,) establishes that an action cannot be maintained to recover an item omitted by mistake in giving judgment on the trial of another cause in which

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it was admitted or proven. *McLean v. Hugarin*, (13 John. 184,) was an action of trover to recover the value of a spinning wheel. The defendant pleaded a former action for the same cause, in which the present plaintiff, being defendant, set off the present demand which was tried in that action. The court say, "although the demand in this case sounds in *tort*, and might not in strictness have been admissible as a set-off on the former trial, yet if it were admitted without objection, and has been once tried, that judgment is conclusive." In addition to the foregoing cases, the counsel cited *Curtis v. Groat*, (6 John. 168.) Groat had sued Curtis in trespass for damages for cutting timber and making it into coal; the coals still being upon his land. The value of the timber cut, and a counter demand for the coal, were fully submitted to the jury. Curtis sued Groat for the coal, and the court held it was sufficient that the demand for the coal had been once submitted to a jury. Upon the more legitimate question in the cause, they held that the plaintiff, being a wilful trespasser, acquired no title to the property merely by changing it from one species into another. The possession had not been changed, and the action was not for taking and converting, and it may be added that the value of the coal might well have been given in evidence in mitigation of damages in the trespass suit. *Wolfe v. Washburn and Hone*, (6 Cowen, 261,) is cited as an authority showing that to warrant a set-off there must be a subsisting debt due *in presenti*, and due from the plaintiff to the defendant; and if otherwise, though it be claimed and allowed by the jury as a set-off, the claim being in fact due to but one defendant and not payable at the time, it is no bar to a subsequent action for the same demand, when it becomes payable, in favor of the defendant to whom it is really due. This rule, as applied to that case, is professedly founded on principles of reason and law, and no cases are cited by Justice Woodworth. In *McGuinty v. Herrick*, (5 Wend. 240,) Ch. J. Savage, delivering the opinion of the court, refers to several of the foregoing cases showing that where a subject has been properly before a jury and passed upon by them it is the end of it. He states the result of the decisions

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to be this, "that if a party to a suit, either plaintiff or defendant, presents a demand which is legal, and proper to be allowed if supported by sufficient testimony, and the jury pass upon it and disallow it, such demand cannot be recovered in another suit. The verdict is conclusive, unless it appears that the claim rejected by them could not legally have been allowed. To take the case out of the operation of the rule, the fact should appear, affirmatively, that the jury could not legally have allowed the defence." *Beebee v. Bull*, (12 *Wend.* 504,) affirms this as the true rule; and *Bull v. Hopkins*, and *Wolf v. Washburn*, *supra*, are cited as fully supporting the opinion that the party is not precluded when the demand rejected by the jury could not legally have been allowed. In *Wilder v. Case*, (16 *Wend.* 583,) the rule laid down by Ch. J. Savage in 5 *Wend.* 240, is summarily disposed of by Justice Cowen, he remarking that no cases were cited by the chief justice, and the point was not involved in the case. I think the learned justice was mistaken in both positions, and he entirely omits mentioning even the case of *Beebe v. Bull*, where the rule of the chief justice is vindicated and approved; nor does he refer to *Wolf v. Washburn* in his own reports.

The following propositions extracted from the opinion of Chancellor Walworth in *Miller v. Manie*, (6 *Hill*, 114,) were adopted by the court of errors. If the same question is submitted to a jury in a first action, and the evidence in the last, if it had been given in the first, would have been equally available as in the last, to entitle the party to recover under the state of pleadings in both, then the verdict and judgment is an absolute bar. But where from the number of the plaintiffs or defendants in the first suit the testimony relied on in the second is sufficient to authorize a recovery in such second action, but could not have produced a different result in the first, the failure of the plaintiffs in the one suit is no bar to their recovery in the other, although it is for the same cause of action for which they attempted to recover in the first suit. I have cited these cases mostly in their chronological order, not, I repeat, for the purpose of reconciling them, or of abstracting from them a rule ap-

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plicable to the case under consideration in which they may be said to harmonize. If there is no case directly in point, we may go back to first principles, and, with such analogical aid as the cases may afford us, fix a rule. If the decisions of this court have been diverse, it is our duty to attain, if possible, uniformity.

In the present case, if the demands of the parties had been admitted, and submitted to the justice, to be disposed of according to law, in the first suit, he could not legally have allowed the offset. Suppose the plaintiff did not object to proving the receipt, and it was read in evidence. It proved that Benton had paid Hatch twenty dollars on another note. Was there any danger that an intelligent court would allow it as a set off on a note against Benton and another, if the plaintiff neglected to show the illegality of such a course? Could he, reposing in the legal intelligence of a court to exclude it, be silent, and then insist that for the reason that he did not himself state the law the claim was lost, though the court administered it justly without such dictation? In the absence of all affirmative proof I cannot infer that Hatch, on the first trial, consented, 1st, that the receipt should be regarded as one for money generally, without any specific appropriation; and 2d, as a receipt for money creating a demand against him in favor of the defendants jointly. I think Hatch is not in as situation to press into his service, in such a case, the much abused maxim that *silence shows consent*. It does appear that the justice rejected the claim, and that it could not legally have been allowed. I think the rule stated in *McGuinty v. Herrick* the true and sensible one. No one conversant with our reports, and especially of cases originating in justice's courts, can have failed to discover that estoppels had ceased to be offensive to the court. Truth has no place of gentle visitation on earth, where she might more confidently anticipate respect and affection than in a court of justice. The principle of an estoppel is generally to prevent circuitry of action, to compel parties to fulfil contracts, to terminate litigation, and to prevent fraud. For any and all of these purposes it should be favored. Truth must, in such case, be sub-

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jected to the humiliation of silence, and the court to the shame of allowing falsehood a temporary triumph. Though much of the odiousness with which the law originally regarded estoppels has faded away, from our familiarity with them as defences, it is no apology for their allowance unless clearly and plainly made out. That is not done in this case. No assent to the set-off is affirmatively shown. None was inferred by the justice from what passed before him; for he disallowed it. If I was compelled at this time to draw an inference from the record, it would be that Hatch objected to the receipt as matter of legal set-off. I put the decision of this case, however, distinctly upon the rule which I have quoted as approved by me.

It was ingeniously suggested by the counsel, on the argument, that the receipt in question was identical with the endorsement of the like sum on the note as of the 21st of February being an inadvertent transposition of the figures 1, 2, making 12 or 21. If such a question had been raised before the justice it is not improbable that the counsel would have urged it with success. The thought did not occur to the party or counsel, and the experiment was untried. "It was objected to on the ground that it had been previously submitted in a former suit and was disallowed for that reason." There is no ground for saying, under the circumstances, that there was evidence that the receipt was endorsed on the note and that the justice so found, as a question of fact.

The judgment of the county court must be affirmed.

SAME TERM. *Before the same Justices.*

**THE COMMISSIONERS OF THE UNITED STATES DEPOSIT
FUND vs. CHASE.**

In July, 1837, R. executed a mortgage to the commissioners of the U. S. deposit fund, to secure the payment of a loan of \$2000. Default being made in the payment of interest, the premises were sold, in February, 1844, and bid off by R. at \$2296,69. On the same day, \$2000 was again loaned to him, by the commissioners, and he executed a new mortgage on the same premises, to secure the payment; and the first mortgage was cancelled. Default was again made in the payment of interest, in 1846, and the premises were advertised and exposed to sale in February, 1847, and no bid made therefor. Intermediate the giving of the first mortgage and the date of the second, C. recovered a judgment against R., under which the premises were sold, and C. became the purchaser, at the sheriff's sale, and was in possession of the premises. In an ejectment brought by the mortgagees against C.; *Held* that the right of possession was in them, and that they were entitled to recover the premises.

Held also that if R., at the time the premises were sold under the first mortgage, paid the amount of his bid in money, to the extent of the sum due for interest, and the expenses, and gave a bond and mortgage, as a borrower, for the principal due upon the first mortgage, such loan was authorized by the statute, and the bond and mortgage were valid; although no money was actually passed and repassed, between the parties.

Where a deed, executed by commissioners of loans, which was required by statute to be subscribed in the presence of two witnesses, was witnessed by but one, but was duly acknowledged by the grantors, at the time; *Held* that it was a good execution.

EJECTMENT for the recovery of lands situate in the county of Otsego. On the 22d of July, 1837, Jesse Rose mortgaged several parcels of land, comprising improved and unimproved lots, to the commissioners of the United States deposit fund for the county of Otsego, to secure the payment of a loan of \$2000. In 1843, default was made in the payment of interest, and the premises were sold on the 6th of February, 1844, and bid off by Rose at \$2296,69. On the same day, \$2000 was loaned to Rose, and he executed a new mortgage on the same premises, to secure its payment. Default was again made in the payment of interest, in 1846, and the premises were advertised and exposed to sale the February following, and no bid made there-

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for. On receiving the second mortgage, the first was cancelled pursuant to the statute. The defendant was a creditor of Rose, under a judgment recovered intermediate the first and second mortgage. A sale was had under an execution issued upon his judgment, and the defendant was the purchaser, and received a deed in due time, and was in possession at the time of the commencement of this suit by the commissioners. The question was, in whom was the right of possession. The jury found a verdict for the plaintiffs; and the defendant moved for a new trial.

E. Smith, for the plaintiffs.

A. Becker, for the defendant.

By the Court, MOREHOUSE, J. By the act authorizing a loan of the moneys of the United States deposited with the state for safe keeping, (*Laws of 1837*, p. 121, § 30,) it is provided that if the borrower neglects to pay the yearly interest within the time limited, the commissioners "shall be seised of an absolute and indefeasible estate in fee in the mortgaged premises to them, their successors and assigns, to the uses in the act mentioned, and the mortgagor, his or her heirs and assigns, shall be utterly foreclosed and barred of all equity of redemption of the mortgaged premises, &c. but the mortgagor, &c. shall be entitled to retain possession of the mortgaged premises, until the 1st Tuesday of February, thereafter." The two succeeding sections provide for a sale, and by section 33, if the amount due on the mortgage for principal, interest and costs is not bid, or being bid, is not paid, the commissioners are to enter into and take possession of the land. The same section secures to the mortgagor the right of redemption until an actual sale of the premises, and upon paying the principal and interest and costs, the title of the premises reverts to and reinvests in the mortgagor, his heirs or assigns. Section 30 of the act in question is a copy (with a few verbal changes of no consequence,) of the fifteenth section of the act of 1808, (*Laws of 1808*, p. 329; 3 R. S. 223,) except

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the latter provision of the section relating to the possession and right to redeem as above mentioned. Under the act of 1808, it was held, in all our courts, that a mortgagor, after the default, had no legal title; and it was doubted whether he had any equitable title which could be directly enforced against the land itself. (3 *John. Ch.* 332. 9 *John. Rep.* 129. 14 *Id.* 362. 8 *Cowen*, 47. 8 *Wend.* 657.) In the last case, Justice Nelson suggested as probable that since the revised statutes in relation to uses and trusts no estate would vest in the commissioners as trustees, and the trust, &c. would only be valid as a power in trust. (1 *R. S.* 729, § 58.) That cause was decided in 1832. The act in question removes all doubt as to the equitable and legal rights of the defaulting mortgagor. He may retain possession until the first Tuesday in February succeeding a default, and redeem at any time before a sale by the commissioners. With this brief abstract of the law and statute applicable to the case I proceed to examine the points and arguments of counsel, repeating the language of the act when its meaning is as distinct as other words could make it.

It is insisted by the plaintiffs' counsel that the sale in February, 1844, by virtue of the mortgage of July, 1837, was conducted in such a manner that the proceedings thereon were void. It is made a point that the deed from them to Rose, though duly acknowledged, having but one witness conveyed no title; that the money not having been actually paid down by the purchaser and redelivered to him as a borrower by the commissioners, rendered the sale void; and that the commissioners having no right, by reason of these irregularities, to cancel the mortgage of 1837, were seised of the premises by virtue of it. These affirmations are denied by the defendant, and if tenable he insists as a corollary, that the plaintiffs can not recover, not having proceeded under the first mortgage to foreclose the equity of the mortgagor. If the borrower neglects to pay, for twenty-three days after the first Tuesday in October yearly, the interest due on his mortgage, or the principal when due, the commissioners are seised of an absolute and indefeasible estate in fee in the lands mortgaged, *to the uses in the act mentioned.*

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The mortgagor is entitled to retain possession until the first Tuesday of February thereafter, and to redeem the same at any time before the sale. It is the duty of the commissioners to expose the lands to sale on the first Tuesday of February succeeding the default of the mortgagor; and if no person bid a sum equal to the amount due on the mortgage, for principal and interest, and expenses of the advertisement and sale, or if any person to whom the land, at such sale, shall be struck off, shall not pay, then the commissioners shall enter and take possession of the lands and premises, and let them for the benefit of the state until the 3d Tuesday in September then next, when they are again to be exposed to sale and sold to the highest bidder, if his bid is equal to the amount due on the mortgage for principal and interest, costs and expenses; if not, then the commissioners in behalf of, and in the name of the people of this state, become the purchasers, under the provisions of the act relating to the appraisement of the premises.

I think the commissioners have no right to enter into and take possession of the premises, but upon the contingencies mentioned in the 33d section of the act, an exposure of the lands for sale and no bid therefor, or the person bidding not paying therefor after they are struck off to him. From my view of the case, however, this point does not arise. The lands mortgaged in 1837, were duly exposed to sale on the first Tuesday in February, 1844, and bid off by Jesse Rose the mortgagor, for a sum equal to the amount due on the mortgage for principal and interest and costs and charges. He, as such purchaser, offered to borrow the principal sum which *was to be paid* by him for the premises, and the commissioners being satisfied that the security offered conformed to the requirements of the act, loaned him the principal sum as a preferred borrower under the 39th section of the act. The terms of the sale are prescribed by the statute, and the commissioners have no discretion. They can not sell on credit, and the whole amount is to be paid down. What they may do is a question of power, and if the terms of sale when the premises are struck off, are not complied with, they cannot resell, but must enter into and take possession.

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(*Sherwood v. Read*, 7 *Hill*, 431.) The questions upon which the plaintiffs rely, recur : Did Rose comply with the terms of sale ? Was the amount bid paid to the commissioners ? From a sense of safety in reposing upon the mortgage of 1837, the counsel for the plaintiffs assumes the negative of these interrogatories. In this I think he is mistaken. The land was struck off to him, and he paid for the same, in money, to the amount due on the mortgage for interest and the expenses of advertisement and sale. And by a bond and mortgage as a borrower equal to the principal due or secured by the first mortgage, such loan is authorized by the 39th section of the act, if the purchaser of mortgaged premises offers to borrow *the principal sum or sums that is or are to be paid by him*. A construction which would require the ceremony of passing and repassing money between the parties, would discredit the intelligence of the lawmakers. Their language repels the disparagement. It is *the sum or sums that is or are to be paid*, and not the sum or sums that has or have been paid, which the purchaser may borrow. If the commissioners had pursued the advice and instructions of the comptroller in circular No. 1, 1840, adapted to such a case, they would have inserted in the second mortgage the fact that it was executed to secure the consideration money on the purchase of the premises therein described. It is not material, however, as affecting the lien of the vendors for the purchase money. It is a right founded in natural justice. It is found in the digest of the Roman law, and explicitly laid down in the Institutes. The vendor of property sold should have priority of payment, for the price, against the vendee and his creditors ; and the doctrine is as familiar in courts of law as courts of equity, and habitually applied in both. Interest was paid upon the mortgage of 1844 for the year 1845, and default made in 1846, the premises advertised for sale on the first Tuesday of February following, and no bid made. The commissioners then had a right to enter into and take possession of the premises, and let them until the third Tuesday in September following, when they were again to offer them for sale. The 27th section of the act requires the mortgages taken to be

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executed in the presence of two or more witnesses who shall subscribe the same as such witnesses. Section 57, prescribing the form of the deed to be executed by the commissioners, on a sale, requires its subscription to be in the presence of two witnesses. The deed to Rose, whatever may have been the number of witnesses present, is subscribed by but one, but it was duly acknowledged at the time. I think that a good execution. Certainly the reason for an attestation by witnesses fails when the deed is duly acknowledged; and the case comes within the general rule of the statute, and the deed took effect immediately. (1 R. S. 738, § 137.) It is undoubtedly true that when a power or franchise is created by a statute which prescribes the mode of its exercise, it must be exercised by the mode pointed out by the act. (*Head v. Providence Insurance Company*, 2 Cranch, 127.) In 1 Burrow, 447, Lord Mansfield says, "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses merely directory." Our own reports are full of cases illustrating the distinction referred to. The leading ones are cited in Smith's Commentaries, chapter 15, of affirmative and negative statutes, 771, §§ 670, 678. By the act, the money was apportioned among the several counties, and again among the cities and towns of the respective counties, and the commissioners "shall loan out the same to the inhabitants of their respective counties on mortgage on improved lands in the same county, owned by the borrower." This provision is clearly directory, within the rule referred to; and a departure from it would not affect the validity of the security, or absolve the borrower from personal responsibility upon his bond.

New trial denied.

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SARATOGA GENERAL TERM, March, 1849. *Paige, Willard,*
and Hand, Justices.

6	43
121a	208
8b	43
33ap	468

SNYDER vs. ANDREWS.

8b	43
89 Mis	12

Where the writer of a letter, containing libellous matter, reads the same aloud to a stranger, it is a publication.

When a charge, in a written publication, is equivocal, the construction of it is a question for the jury.

Where the writing complained of as libellous, is plain and unambiguous, the question, in a civil action, whether it be a libel or not, is a question of law. HAND, J. dissented.

In a civil action for a libel, or slander, the truth of the charge is a justification; but it can not be given in evidence unless it is pleaded, or notice thereof is given with the general issue.

Under the general issue, in an action for libel or verbal slander, any matter may be given in evidence in mitigation, which does not tend to a justification, and which falls short of it.

The cases on the law of libel, as to the rights and duties of the court and jury respectively, stated and explained.

THIS was an action on the case for a libel. The defendant pleaded the general issue, and gave notice of special matter. The alleged libel was contained in a letter written by the defendant and addressed to the plaintiff, and sent to him by mail, after having been read to two or three persons by the defendant. The most material part of the letter was as follows: "Sir: It is now discovered who had received the balance of account from George W. Cole. I sued him and he brought forward a receipt in which my name was used; but every word, line and letter was in your hand-writing. Now here is a deliberate attempt to charge me with moneys which I never received; and my name signed to a receipt which I never saw until it was presented in court, and without any authority from me. It is not my purpose to call hard names. The statute fixes the name and punishment of the offence. It is fortunate for you that some of your good friends here are not the parties offended against, or they would most likely put you to a deal of trouble. It is surprising that any person should be guilty of such an act,

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when detection was inevitable. On the opposite half sheet is my account against Gazlay & Snyder and yourself. If the amount is remitted to me immediately, by mail, the matter will rest, so far as I am concerned, unless called on to testify, in which case I have no alternative. You can have no possible excuse for the course you have pursued in this matter. You could not have forgotten the payment of the money to you by Cole; and the only hope of impunity you must have drawn from the supposition that Cole had lost the receipt," &c.

The notice annexed to the plea stated, in substance, that previous to the writing of the alleged libel the plaintiff and one A. H. Gazlay had been copartners in the saddle and harness making business; that on a dissolution of the copartnership they placed their accounts, &c. in the hands of the defendant for settlement and collection; that among them was one against G. W. Cole, who paid thereon \$10 to the defendant, leaving a balance of from five to eight dollars unpaid; that on rendering to the plaintiff and Gazlay an account of the moneys collected by him as their attorney, it appeared that there was due from them to the defendant, for collection fees, the sum of \$4.37; whereupon it was agreed between the parties that the defendant should retain the account against Cole, and collect the same, and from the proceeds pay himself the balance due him; that Cole, on being called upon to pay the balance of his account, informed the defendant that he had paid the same to the plaintiff; that the defendant communicated that fact to Gazlay, and Gazlay told the plaintiff of it, who denied all knowledge of such payment; that thereupon, with Gazlay's assent, a suit was brought against Cole, to recover the balance of the account; that on the return day of the process, Cole produced a bill in favor of Gazlay & Snyder against him, amounting, after deducting a credit of \$10, to \$7.89. This bill was receipted, at the bottom thereof, as follows: "Rec'd payment in full of the above account. By J. M. Andrews. GAZLAY & SNYDER." That such receipt was in the hand-writing of the plaintiff; that the defendant never received the said sum of \$7.89, or any part thereof, directly or indirectly from Cole, and never signed such

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receipt nor authorized any person to do it for him ; and that the plaintiff had admitted that he executed and delivered the receipt. And that after the suit against Cole had been discontinued in consequence of the production of such receipt, the defendant, at the request, and with the knowledge, of Gazlay, wrote a letter to the plaintiff, informing him of the result of the suit, and of the causes which produced it ; that before the letter was sent Gazlay called upon the defendant several times for the purpose of seeing and conversing with him in relation to said business ; and that whatever knowledge he obtained in relation to such letter, or its contents, was a confidential and privileged communication as between attorney and client ; that such letter was not shown or read to any one else, but was strictly a private letter, and as such was sent to the plaintiff ; which letter was the same set out in the plaintiff's declaration, &c.

The cause was tried at the Saratoga circuit, in November, 1847, before Justice PAIGE. On the trial the defendant admitted that he wrote the letter containing the alleged libel, sealed the same, and put it into the post office at Saratoga Springs, directed to the plaintiff, at his residence. The plaintiff proved by John R. Brown, that the letter was read to the witness by the defendant, at his office, in the presence of a young man who was a clerk of the defendant. The defendant's counsel then moved for a nonsuit, on the ground that a publication of the libel had not been proved. The judge denied the motion. The defendant then offered evidence in support of the defence set forth in his notice. The plaintiff's counsel objected to the introduction of such proof, unless the defendant elected whether he would offer it in justification, or in mitigation of damages. The judge decided that the letter imported a charge of forgery, and that the facts stated in the notice did not make out a justification of such a charge ; but that the evidence was admissible in mitigation of damages. The defendant excepted to both branches of this decision, separately. His counsel then offered to prove such facts in mitigation of damages, and the court admitted the evidence for that purpose only. The judge, in charging the jury, told them that the reading of the letter

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by the defendant, in Brown's hearing, amounted to a publication of the libel. That the letter imported a charge of forgery against the plaintiff; and that they could only consider the facts proved by the defendant, in mitigation of damages. The jury found a verdict for the plaintiff, of \$250. And the defendant, upon a bill of exceptions, moved for a new trial.

A. Bockes, for the plaintiff.

D. Wright, for the defendant.

WILLARD, J. There are only three points raised by this bill of exceptions, viz. First, whether the reading of a letter, alleged to be libellous, to a third person, is a publication. Second, whether the judge was warranted in charging the jury that the letter in this case imported a charge of forgery. And third, whether the facts proved, on the part of the defendant, were admissible in *bar* of the action, or only in *mitigation* of damages.

First. The fact, that the defendant read the letter to a stranger, before it was sent to the plaintiff, was not questioned on the trial, and is assumed to be true, by the form of the objection; but it is insisted, that such reading did not amount to a publication of the libel. No man incurs any civil responsibility by what he thinks, or even writes, unless he divulges his thoughts, to the temporal prejudice of another. Hence, a sealed letter, containing libellous matter, if communicated to no one but to the party libelled, is not the foundation for a *civil* action, although it may be of an indictment. (*Lyle v. Clason*, 1 *Caines*, 581. *Hodges v. The State*, 5 *Humphrey*, 112. 1 *Wm. Saund.* 132, n. 2. *Philips v. Jansen*, 2 *Esp. C.* 626. 2 *Starkie on Slander*, *Wend. ed.* 14.) But where the defendant, knowing that letters addressed to the plaintiff were usually opened by, and read by his clerk, wrote a libellous letter, and directed it to the plaintiff, and his clerk received and read it, it was held there was a sufficient publication to support the action. (*Delacroix v. Thevenot*, 2 *Stark. Cases*, 471.) And in *Schenck v. Schenck*, (1 *Spencer*, 208,) a sealed letter addressed and

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delivered to the wife, containing a libel on her husband, was held a publication sufficient to enable the latter to sustain an action. Reading or singing the contents of a libel in the presence of others, have been adjudged a publication. (2 *Starkie on Slander*, 16. 5 *Rep.* 125. 9 *Id.* 59, b. 1 *Saund.* 132, n. 2.) The reading of the letter in question, by the defendant, in the presence of Brown, was a sufficient publication to sustain this action.

Second. The second objection is that the learned judge charged the jury that the letter imported a charge of forgery against the plaintiff. This involves two propositions; first, as to the *fact* whether such charge was made in the letter; and secondly, whether the court or the jury, in a civil action, are to decide as to whether the publication be a libel or not. Although the letter does not use the term forgery, no one can doubt that the writer intended to communicate the imputation of that crime. It charges the plaintiff with having subscribed the defendant's name to a receipt for money, which the defendant never received; and with having so subscribed it without authority. "It is not my purpose," says the letter, "to call hard names. The statute fixes the name and punishment." In other places he charges that it was done to defraud him, the defendant, out of the money. If the letter had been equivocal in its terms, it would have been the duty of the judge, to submit the construction of it to the jury. (See *Van Vechten v. Hopkins*, 5 *John. Rep.* 211; *Goodrich v. Wolcot*, 3 *Cowen*, 231, affirmed in error, 5 *Id.* 714; *Woolworth v. Meadows*, 5 *East*, 463; *Peake v. Oldham*, *Cowper*, 278; *Dexter v. Taber*, 12 *John. Rep.* 239; *Van Rensselaer v. Dole*, 1 *John. Cas.* 279; per *Woodworth, J.* in *McKinley v. Robb*, 20 *John. Rep.* 356; *Demarest v. Haring*, 6 *Cowen*, 76; *Ex parte Bailey*, 2 *Id.* 479; *Mott v. Comstock*, 7 *Id.* 654; *Bullock v. Coon*, 9 *Id.* 30; *Powers v. Price*, 12 *Wend.* 500; 4 *Watts*, 392; 4 *Wend.* 320; 17 *Id.* 428, 429, per *Bronson, J.*)

It does not, however, appear that the defendant's counsel asked to go to the jury with any question connected with the meaning or construction of the letter; or that he required the judge to submit to them any such question. Assuming, then,

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that the letter contains clear and unequivocal libellous matter, the further question arising under this point, is, whether it was error in the learned judge so to tell the jury; or whether he was bound to submit it to them as matter of fact, to find whether it was a libel or not. In other words, whether, in a civil action, the question of libel or no libel, is a question of law or of fact. The question is of sufficient importance to justify an examination of it upon principle and authority.

If the writing complained of is couched in clear and unambiguous terms, so that no circumstances are wanted to make it clearer than it is of itself, the question whether it be a libel or not is necessarily one of law and not of fact. Such seems to be the result of the opinion of Lord Chief Justice De Grey in the house of lords, in the case of *The King v. Horne*, (*Cowper*, 672,) cited with approbation by Van Ness, J. in *Van Vechten v. Hopkins*, (5 *John*. 221.) To the same effect are *Rex v. Burdett*, (4 *Barn. & Cress.* 95,) decided in 1820, *Haire v. Wilson*, (9 *Id.* 643,) decided in 1829, and *Fisher v. Clement*, (10 *Id.* 472,) decided in 1830. This doctrine was in substance conceded by General Hamilton in his celebrated argument in *The People v. Croswell*, (3 *John. Ch.* 361, 2,) in his 13th proposition: "That in the general distribution of powers, in any system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury. That as often as they are not blended, the power of the court is absolute and exclusive. That in *civil cases* it is always so, and may be rightfully so exerted." And it was expressly asserted by Kent, J. in delivering his opinion in the same case. (*Id.* 376.) "The opinion" of the judge in criminal cases, he observes, "will generally receive its due weight and effect, and in *civil cases* it can and always *ought* to be ultimately enforced by the power of setting aside the verdict."

The English cases and elementary writers, until within a few years, spoke a uniform language on this subject; holding that jurors are not the judges of the law, in civil actions for a libel, notwithstanding the statute 32 G. 3, ch. 60, commonly called Mr. Fox's act. (*Levi v. Milne*, 4 *Bing.* 195, decided in 1827. *Starkie on Slander*, *Wend. ed.* 275, 6, and note. *Rex v. Bur-*

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dett, 4 B. & C. 95, *supra*.) And in the last mentioned case, they held that the jury, even in a criminal case, was bound to receive the law from the court on the question whether the publication was a libel, or not. The cases in which a defence has been predicated upon the *occasion of the publication*, as showing an honest and fair intent in the defendant, and requiring, to support the action, evidence of *express malice*, are not a departure from previous adjudications, nor in conflict with this rule. *Fairman v. Ives*, (5 Barn. & Ald. 642,) was of this description.

The case of *Parmeter v. Coupland*, in the court of exchequer in 1840, (6 Meeson & Welsby, 105,) is supposed to be at variance with the prior decisions in England; and as it is the leading case of the *new doctrine*, and the one on which the subsequent case of *Baylies v. Lawrence*, (11 Ad. & Ellis, 920,) is based, it will be well to examine it more in detail than its importance would otherwise merit. It was an action for a series of libels, published of the plaintiff, the late mayor of the borough of Winchester, in the Hampshire Advertiser newspaper, between the 17th Nov. 1838, and 2d March, 1839, imputing to him partial and corrupt conduct, and ignorance of his duties, as mayor and justice of the peace for the borough. At the trial, under the plea of not guilty, before Coleridge, J. the learned judge, in the course of his summing up, stated to the jury that there was a difference with regard to censures on public and on private persons; that the character of persons acting in a public capacity was to a certain extent public property, and their conduct might be more freely commented on than that of other persons; and having told the jury what, in point of law, constituted a libel, he left it to them to say, whether the publication in question was calculated to be injurious to the character of the plaintiff. The jury found a verdict for the defendants. On a motion for a new trial, the plaintiff's counsel contended that the learned judge misdirected the jury, in not stating to them, as matter of law, that the publications in question amounted to libels. The counsel contended that the same principle should apply to written as to oral slander. That the words here complained of were clearly actionable if spoken; and the judge would, in

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such case, have been bound to tell the jury that if they were used in their ordinary sense, the plaintiff was entitled to recover. After further remarks of the counsel, Parke, B. interrupting the counsel, observed that the practice used to be as the counsel said, before Mr. Fox's act, 32 G. 3, ch. 60. "That act," the counsel replied, "is expressly confined to *criminal* cases." [Parke, B. "It is true; but it has been the constant practice, in recent times, for the judge to define what is a libel, and then to leave it to the jury, first, whether the writing complained of was published by the defendant; secondly, whether it fell within the definition of the offence."] Lord Mansfield distinctly laid it down, in the case of *Rex v. Dean of St. Asaph*, as a general rule, applicable to all cases, when by the form of the pleading the questions of law and fact can be severed, that the jury have no jurisdiction to decide upon the law. When indeed the words may be controlled by the context, or are capable of more than one meaning, the question must be left to the jury; but here there is nothing whatever to throw ambiguity upon the meaning of these paragraphs. [Parke, B. "In criminal cases the judge is to define the crime, and the jury are to find whether the party has committed that offence. Mr. Fox's act made it the same in cases of libels, the practice having been otherwise before."] In the next place the counsel contended that it was a misdirection to state to the jury, that there was a distinction as to libels on a person in a public capacity. No man has a right to impute to another, whether filling a public capacity or not, injustice or corruption. Parke, B. "The verdict is unquestionably wrong, and there ought to be a new trial, but on the ground of its being a wrong verdict only. I think there was no misdirection on the part of the learned judge. One of the grounds upon which this rule was obtained was, that the learned judge ought to have told the jury that the terms of these papers were libellous, and not to have left that as a question of fact for them to determine. But it has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary

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to constitute that offence, are proved to their satisfaction ; and that whether the libel is the subject of a criminal prosecution or civil action. A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion as a question of fact. The judge, as a matter of advice to them in deciding that question, might have given his own opinion, as to the nature of the publication, but was not bound to do so, as matter of law. Mr. Fox's libel bill was a declaratory act, and put prosecutions for libel on the same footing as other criminal cases. I also think that there was no misdirection in the other part of the learned judge's summing up to which an objection was raised. There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander ; but any imputation of wicked or corrupt motives is unquestionably libellous ; and such appears to be the nature of the publication here. I do not find that the learned judge stated otherwise ; we cannot therefore grant a new trial, as for a misdirection."

The other judges concurred. Alderson, B. remarked "that it was the duty of the judge to define what is a libel, and to refer to the jury the consideration of the particular publication, whether falling within that definition or not. I think if he were to take it upon himself to say that it was a libel, he would be wrong in doing so." Rule absolute for new trial, on payment of costs.

We have given a full abstract of this case because it has gone further than any other at bar, in favor of submitting to the jury the question of libel or no libel, in a civil action, when there is nothing ambiguous or doubtful in the publication. It is admitted to be a practice that has grown up, in recent times, and that it owes its origin to a construction given to the libel bill of Mr.

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Fox, (32 G. 3, ch. 60,) which will be more fully noticed hereafter. With the particular construction of that act, which the courts in Great Britain may, from time to time adopt, we have little to do. We can not but remark, in reference to the case of *Parmeter v. Coupland*, (*supra*,) how readily one anomaly in practice leads to another. The judges refuse to instruct the jury, whether a publication, clear and unambiguous in its terms, and confessedly a libel, falls within the definition of a libel, but leave it for the jury to decide, who find for the defendants; and then the court set aside the verdict as against law. If the question was properly for the jury, and fairly submitted, their decision should, on principle, be conclusive. If the court have the power to set aside the verdict, when for the defendant, because the jury have found against law, it seems to us the better remedy is to pursue the old practice of declaring the law before verdict, as in other civil cases, and thus preserve consistency and uniformity in the system.

The case of *Parmeter v. Coupland*, in the exchequer, was followed, in the same year, by that of *Baylies v. Lawrence* in the queen's bench. (11 *Ad. & Ellis*, 920.) The latter was an action for a libel alleged to be contained in a letter from the defendant to the landlord of the plaintiff, complaining of the conduct of the latter, in relation to the destruction of game. The letter was given in evidence, and with respect to it, the Lord Chief Baron, (Abinger,) before whom the cause was tried, said to the jury: "I own I find a difficulty in saying whether it is a libel or not. Gentlemen, can you assist me?" His lordship gave no other direction as to that issue. The plaintiff obtained a rule for a new trial, on the ground of misdirection. In showing cause against the rule, the defendant's counsel contended that the judge is not bound to give his opinion whether the publication be libellous or not. They relied on the libel act, (32 G. 3, ch. 60,) the second section of which enacts "that the court or judge, *according to their or his discretion*, shall give their or his opinion and directions to the jury." And they also relied upon the case of *Parmeter v. Coupland*, (*supra*.) The counsel on the other side insisted that the case of *Haire v. Wil-*

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son, (9 B. & Cress. 643,) and *Fisher v. Clement*, (10 Id. 472,) established a different doctrine from that advanced by Lord Abinger, and that it was at least his duty to give a definition of a libel. Lord Denman, Ch. J. "This rule was granted for the purpose of settling the practice. Two cases have been cited, in which this court is supposed to have held that the judge must tell the jury whether the publication be a libel or not. I think that when these cases are properly considered, they do not go so far. They show that a judge must not leave the fact of the defendant's intention, as a question for the jury, except so far as the intention may be shown by the tendency of the publication itself. A man may wilfully publish a mischievous libel without intending to injure the party, yet may be responsible. He may, indeed, in effect do him no harm, by the publication, for it may be that blame from some quarters is more valuable than praise. Yet he must answer for such a publication. I have always followed the practice adopted in this case by Lord Abinger, leaving the jury to say whether under all the circumstances, the publication amounts to a libel. That practice is analogous to the enactments of 32 Geo. 3, ch. 60. The statute indeed is applicable only to criminal cases; but it was a declaratory act; and the importance of declaring the law existed only in criminal cases. The act therefore furnishes clear evidence that the judge is not, in civil cases, bound to state his opinion whether the publication be libellous or not. And this agrees with the late case of *Parmeter v. Coupland*, (6 M. & W. 105.) There is indeed one case in which a pure question of law arises. If the judge and jury think the publication libellous, still, if on the record it appears not to be so, judgment must be arrested."

The other judges concurred with the lord chief justice. Patterson, J. remarked, that "upon examining the cases, cited in support of the rule, it appears from them, only, that it is misdirection to leave to the jury the intent as a general question of fact, because the defendant must be taken to intend that which is the obvious consequence of his publication. A judge is of course not precluded from giving his opinion, but he is not bound to do so." Rule discharged.

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With reference to the case of *Baylis v. Lawrence*, (*supra*,) it may be remarked, that the alleged libel was so vague in its terms that it was a proper question for the jury under any previous state of the law of libel. Had the court decided no more, than that in that particular case, Lord Abinger was right in submitting it to the jury, the decision could not have been questioned on principle or authority. But it is obvious that the court meant to place the decision upon the construction of the libel act. (32 G. 3, ch. 60, § 2.) The clause on which they lay stress, viz. "that the court or judge, according to their or his discretion, shall give their or his opinion and directions to the jury," is not contained in the libel act of this state of 1805, (2 R. L. 553,) nor in the constitution of 1821; (*see Art. 7, § 8*;) nor in the present constitution. (*See Art. 1, § 8*.)

The cases of *Parmeter v. Coupland* and *Baylis v. Lawrence* were followed by that of *Hearne v. Stowell*, in the queen's bench in 1841. (4 P. & D. 697.) The latter is the converse of *Parmeter v. Coupland*. In *Parmeter v. Coupland* the jury found for the defendant, and the court set aside their verdict as against law. In *Hearne v. Stowell*, the learned judge, after disposing of other matters, instructed the jury, if they thought the matter of the publication to be libellous, to find a verdict for the plaintiff," and the jury found for the plaintiff. A motion was made by the defendant in arrest of judgment and for a new trial, mainly on the ground that "the learned judge ought to have told the jury that the declaration did not charge any thing libellous."

The counsel for the plaintiff relied mainly upon the construction of the libel act, as declared in *Parmeter v. Coupland* and *Baylis v. Lawrence*, and insisted that whether a particular publication be libellous is a question of fact for the jury, and they having found it libellous, under a proper direction from the court, the verdict could not be disturbed.

Lord Denman, Ch. J. on this branch of the argument remarks, "we were desirous of considering whether the defendant was entitled to a new trial because the learned judge ought to have told the jury to acquit on the plea of not guilty."

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If the learned judge had been pointedly required to do this, he might have declared his opinion on the question of law now discussed, or he might have reserved the point for the court. If he had told the jury that the paper proved was a libel, when the court was of opinion that it was not, we should have been bound to set aside a verdict so obtained, for misdirection. But the defendant, on the trial, took a different course, and sought an acquittal from the occasion of reading this libel, the bona fides of his strictures on the Catholic priesthood, and indeed, from insinuating that they were founded in fact. Nor did the learned counsel object to the reception of evidence, which it is now truly observed, applied to no fact put in issue. We do not think it open for him to move for a new trial on this objection." The court, however, arrested the judgment, on the ground that the publication, as set forth in the declaration, was not a libel.

It thus has been seen that in England, it is not error for the judge, in a civil action for a libel, to give his opinion to the jury on the question whether the publication be a libel or not; but he is at liberty to do so or not at his discretion. It was the general understanding in this state, that the libel act of 1805, and the same provision incorporated into section 8 of article 7 of the constitution of 1821, applied only to a *criminal* proceeding for a libel, and did not affect the practice in *civil actions*. Hence, in the latter cases the jury were no more the judges of the law in an action for a libel, than in any other civil suit; and it was as much the duty of the judge to instruct the jury on the law in the one case as the other. A contrary suggestion was never advanced in our reports until the intimation of senators Root and Verplanck, in 1841, in the case of *Dilloway v. Turrell*, (26 *Wend.* 399, 402.) But the chancellor expressed his surprise at that construction of the constitution, and ventured to say that no lawyer had ever before supposed that the provision in question extended to civil suits for a libel, between party and party. He showed also that if a civil action was embraced under that clause of the constitution, instead of operating favorably to defendants, it would have a contrary tendency.

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At common law, the truth has always been a defence to a civil action for a libel; but if this provision of the constitution was to be extended to civil suits, the truth would no longer be a defence unless the defendant could also show that the publication was from good motives and justifiable for ends. In the late convention, the committee on the rights and privileges of the citizens of this state, on the 30th of June, reported the 8th section of the 7th article of the constitution of 1821, so amended as to apply expressly to *civil actions*, thus making the jury the judges of the law and the fact in civil as well as criminal cases; and preventing the truth from being a defence in both, unless it was shown to be published from good motives, and for justifiable ends. (*Croswell's Rep. of Conv.* p. 153.) At a subsequent day, (*Id.* p. 813, 814, and *Atlas ed.* 1061,) the words *civil actions* were stricken out, and the section was adopted, extending in terms only to criminal prosecutions; and leaving it in other respects unaltered. (See 1 article, § 8 of Constitution of 1846.)

From this review of the cases, there can be no doubt that the learned judge did not encroach upon the prerogative of the jury, in charging that the letter in question was a libel.

Third. The remaining question is whether the facts proved under the notice were admissible in *bar* of the action, or only in *mitigation* of the damages.

No question is better settled than that in a civil action for a libel or verbal slander, the truth cannot be given in evidence as a defence, unless notice thereof is given with the general issue, or the matter is specially pleaded. The plea or notice of justification must be framed with the same degree of certainty and precision as are requisite in an indictment for the crime imputed. (*McPherson v. Daniels*, 10 B. & C. 249. 1 *Starkie on Sland.* 476. *Underwood v. Park*, 2 Str. 1200. *Bul. N. P.* 9. *Smith v. Richardson*, *Willes*, 20. 5 B. & A. 646. 2 *Phil. Ev.* 249. 2 *Stark. Ev.* 470, 471. 2 *Stark. on Sland.* 87.) The foregoing are English authorities, but the same doctrine has been held here, as far back as our reports extend, without a single exception. (See 13 *John.* 477; 14 *Id.* 233; *Root v. King*, 7 *Coven*, 632; *Anthony's N. P.* 25, n. e.; 8 *Wend.* 576; 19 *Id.* 487.) The

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notice does not profess to be in bar of the action. Every fact it discloses was admissible under the general issue. It has always been competent, under that issue, to give any thing, in evidence in mitigation, which does not tend to a justification, and which falls short of it. (*Gilman v. Lowell*, 8 *Wend.* 573. *Purple v. Horton*, 13 *Id.* 9. *Cooper v. Barber*, 24 *Id.* 105, 108.) Under the code, it seems, a different rule will prevail; and matters of mitigation as well as of justification are put upon the same footing, and must be set up in the defendant's answer. (*Code of Procedure* §§ 142, 144.) But this cause was commenced and tried before the code of procedure was enacted.

The facts proved under the notice were thus fairly submitted by the learned judge to the jury. The reason why they did not exert a favorable influence on their minds, probably arose from circumstances not disclosed in the bill of exceptions. At any rate, the court can not grant a new trial on a bill of exceptions for an unwise exercise of the discretion of the jury as to the amount of damages.

PAIGE, P. J. concurred.

HAND, J. A witness stated that the plaintiff, who lived in Clinton county, came to Saratoga six weeks after the letter was written. The defendant's counsel called upon the plaintiff's counsel to state the object of this proof. To which it was replied that "in the declaration the plaintiff claimed special damages for being compelled, in consequence of the libel, to proceed from Clinton county to Saratoga Springs; and he offered this evidence in relation to that part of the declaration." To this evidence the defendant's counsel objected, but the court decided that it was admissible for the purpose for which it was offered, and the defendant excepted.

I am inclined to think this was error. The inquiry was not pursued, and the answer had been given before the objection was taken. But as soon as the defendant discovered the object he made the objection, and the testimony was held to be admissible, and of course was allowed to go to the jury. That

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the plaintiff saw fit to go to Saratoga to make inquiry in relation to the matter, was a circumstance having no legitimate bearing upon the question of damages. It was altogether too remote, and not the necessary consequence of the libel. But there are other and more important questions in the case.

The court charged the jury that "the reading of the letter by the defendant in Brown's hearing, as stated by Brown, amounted to a publication of the libel." To this the defendant excepted. By this remark the court no doubt intended to say, that if the jury believed the defendant read the letter to Brown, that would be a publication. Whether this letter was read to Brown, or whether any letter to the plaintiff was read to him, were questions for the jury and not for the court; and I do not understand the judge to have intended to decide otherwise. Whether facts sufficient to constitute publication have been proved, has always been considered a question for the jury. (*Cooper v. Greeley*, 1 *Denio*, 361.)

But again; the judge charged the jury that "the letter imputed a charge of forgery against the plaintiff." To this the defendant also excepted. This was tantamount to saying that the instrument was a libel, and gave a construction to it, as a matter of law. Perhaps the respective duties of the judge and the jury, in libel cases, are not very clearly or well settled in this state. The old rule in criminal prosecutions was, or at least was often declared to be, that the jury had only to pass upon the questions of publication and the truth of the innuendoes. And yet in the celebrated case of the Seven Bishops, it would seem the court submitted more than this to them. (4 *St. Tr.* 304.) This rule prevailed until the act of 32 Geo. 3, c. 60, which in criminal cases changed it, or perhaps only declared it to be different. But that act, for a long period, was held not to extend to civil cases, and in criminal cases was very much restricted. The origin and history of this statute and our "act concerning libels," passed April 6, 1805, are familiar to every lawyer. (3 *Hallam's Eng.* 230. 5 *Campb. Lives of the Chan.* 274, ch. 148. *The People v. Crosswell*, 3 *John. Ca.* 337.) The courts of this state, (as well as those of England,) treated

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the statute as inapplicable to civil cases, in which the court were to declare whether the matter published amounted to a libel. (*Turrill v. Dolloway*, 17 Wend. 426. 2 *Starkie on Slander*, ch. 16. *King v. Burdett*, 4 B. & Ald. 95, 131. *Levi v. Milne*, 4 Bing. 195.) But in the court for the correction of errors, the case of *Turrill v. Dolloway* was reversed, on the ground, as I understand the case, that the jury had a right to decide in what sense the words were used. (*Dolloway v. Turrill*, 26 Wend. 383.) Some of the members of the court considered the statute to apply to civil suits. This decision was in 1841; and a short period before, the courts in England had taken similar ground. In *Baylis v. Lawrence*, (11 Ad. & El. 920,) the judge left the question to the jury, without giving any opinion, and the court held he was right. And Ld. Denman, C. J. said, "I have always followed the practice adopted in this case by Lord Abinger, leaving the jury to say whether, under all the circumstances, the publication amounts to a libel." And he thought the libel act of 1792 applicable only to criminal cases, but declaratory of the law in civil cases. And Littledale, J. said, that he knew "no distinction between the law in criminal cases and that in civil cases in this respect." Patterson and Williams, Js. thought the judge could give his opinion as in other cases of fact, and might have given the definition of a libel, but "must still have left it to the jury whether the particular case fell within the definition." Certainly, if it was a question of law for the court, the judge was bound to declare whether the article was libellous. In *Hunt v. Algar*, (10 Bing. 245,) *Par-meter v. Coupland*, (6 M. & W. 105,) *Fairman v. Ives*, (5 B. & Ald. 642,) *Fisher v. Clement*, (10 B. & C. 472,) *Hearne v. Stowell*, (12 Ad. & E. 719,) *Chalmer v. Payne*, (2 Cr. M. & R. 156,) a similar practice seems to have obtained. And in *Ex parte Bailey*, (2 Cowen, 482,) the court say, that where there is room for the least criticism upon the import of the words it is a proper question for the jury, whose decision is conclusive. (And see *Goodrich v. Wolcott*, 3 Cowen, 231.)

I do not say there are not cases in which the court may perhaps give a construction to the publication, as in the case of a

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gross and unqualified charge of a crime ; but this paper I think should have been submitted to the jury. And upon the whole, I think the safer practice is, for the judge to define what is a libel in point of law, and then leave it to the jury to say, whether the case falls within that definition. (1 *Saund. R.* 248, n. ed. of 1840. 2 *Greenl. Ev.* § 411. *N. Y. Const. Art.* 1, § 8. 1 *R. S.* 94, § 21.) Indeed, Best, J. in *King v. Burdett*, substantially admitted this to be the correct practice. (4 *B. & Ald.* 131.) As I understand the charge in this case, it was not a mere opinion, but a direction to the jury that, as matter of law, the letter charged the plaintiff with the commission of a crime. That I think was a question of fact for the jury,

New trial denied.

SAME TERM. *Before the same Justices.*

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By the true construction of the general repealing act contained in the revised statutes, and of the recording act of 1827 embraced in those statutes, the previous recording acts remain in force in respect to prior unrecorded deeds and mortgages ; at least so far as such acts relate to the rule of priority between such deeds and mortgages, or between them and subsequent conveyances ; the former recording acts not being absolutely repealed by such general repealing act, and the recording act contained in the revised statutes not applying to previous deeds and mortgages.

The registry acts are remedial, and must therefore be liberally and beneficially construed.

The general system of legislation upon the subject matter of a statute, may be taken into view, in order to aid the construction of a particular statute relating to the same subject.

An order to confirm a master's report of sale is not necessary, to pass the title to the purchaser. The title passes by the master's deed ; and the master is authorized to convey after the enrolment of the decree, and before the confirmation of the report of the sale.

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The subsequent confirmation of the master's report relates back to the date of the deed executed by him.

Notice to a subsequent purchaser, or mortgagee, of a prior mortgage, must be direct and positive, or implied. A notice which is barely sufficient to put the party on inquiry is not enough. Nor is a suspicion of notice sufficient.

THIS was an action of ejectment, commenced on the 28th of November, 1843. It was tried at the Washington circuit in June, 1848, before Justice Hand. The plaintiff claimed title as a purchaser under a decree of foreclosure in chancery of a mortgage given by William Burch to Lewis Fort, dated April, 1838, acknowledged on the 11th and recorded on the 13th of April, 1838. The condition of the mortgage was that William Burch, &c. should pay to Lewis Fort all damages, &c. which the latter might be liable to pay in consequence of a bond executed by him to James P. Randall. The plaintiff introduced in evidence an assignment of the bond and mortgage from Lewis Fort to James P. Randall, dated the 5th of March, 1840; a certified copy of the enrolled decree in a suit in which Randall was complainant, and Burch and others defendants, foreclosing such mortgage, signed August 29th, 1843; the master's report of sale; the order of confirmation; a deed from J. G. Britton, master in chancery, to the plaintiff, Garret Fort, acknowledged and recorded the 12th of October, 1843. A notice of lis pendens was filed January 12, 1842. The defendant's counsel moved for a nonsuit, on the ground that the order confirming the master's report of sale was not entered until after the commencement of the suit. This motion was denied. The defendant gave in evidence a mortgage given by William Burch to Jonathan Burr, dated the 30th of April, 1827, duly acknowledged but not recorded, conditioned to pay \$500 in two annual payments after the 1st of April, 1827; and copies, of a bill in chancery filed by Burr against Burch September 24th, 1842, to foreclose such mortgage; of the report of the master, of the amount due; and of the report of the sale of the mortgaged premises, with the certificate of the clerk of the 4th circuit, dated November 21, 1844, stating that such papers had been compared with the originals on file and were correct transcripts therefrom and

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of the whole of such originals. The defendant's counsel then introduced in evidence a copy of an enrolment of the decree in such suit of *Burr v. Burch*, referring to the bill and taxed costs as annexed, and setting forth a copy of the final decree, with a certificate of the clerk, stating that the foregoing was a copy of the decree and history of the case contained in an enrolment on file, &c. The plaintiff's counsel objected to the certificate of the clerk, on the ground that it did not contain the facts required by the statute to make it evidence, and because it did not contain copies of all the enrolled papers. The justice decided that the certificate was sufficient, at common law; to which decision the plaintiff excepted. The defendant then introduced in evidence an exemplified copy of an order confirming the master's report of the sale in the suit of *Burr v. Burch*, entered on the 5th of October, 1844; a master's deed dated the 1st of February, 1843, from Ira A. Paddock, master in chancery, of the premises in question, to J. Burr, duly acknowledged on the 5th of October, 1844, but not recorded; a quit-claim deed dated March 27th, 1843, from Burr to William Whiteside, of the same premises, acknowledged and recorded on the day of its date. The defendant moved for a nonsuit, on the ground that he had shown a title out of the plaintiff. The plaintiff insisted that his title was protected by the recording acts. The defendant insisted that there was no law in force which gave the mortgage under which the plaintiff claimed, any preference, by reason of its having been recorded, over the mortgage given to Burr. The justice refused to nonsuit the plaintiff, and directed a verdict to be taken subject to the opinion of the supreme court. To this decision the defendant excepted. The plaintiff insisted that the defendant's title was defective, on the ground that the decree under which he claimed was not enrolled until after the commencement of this suit. The justice decided that the omission to enrol the decree did not affect the title of the purchaser, and if it did, that the mortgagee being in possession, by the defendant, under the Whiteside deed, his mortgage was a defence to the suit, without a foreclosure. To this decision the plaintiff excepted. The defendant then called wit-

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nesses to prove notice to Lewis Fort of the prior unrecorded mortgage of Burr. He offered to prove by one Kelsey that Lewis Fort, in 1837, admitted to him that he knew of two mortgages given by Burch to Burr, on the premises in question. This evidence was objected to, because Lewis Fort was a competent witness. The justice sustained the objection, and the defendant excepted. The defendant proved by one Hoag that at the sale under the Fort mortgage, the plaintiff induced such witness to stop bidding for the premises, by proposing to let the witness take the premises in case he, the plaintiff, should bid them off. The plaintiff and Whiteside continued bidding, and the premises were finally struck off to the plaintiff. Whiteside forbid the sale, and gave notice that he had purchased the premises of Burr; and afterwards bid at the sale, against the plaintiff. The premises in question were sold under the Burr mortgage on the 1st of February, 1843. The master's deed, founded upon such sale, was executed on the 5th of October, 1844. The defendant went into possession as Whiteside's tenant, on the 1st of April, 1843. Lewis Fort was called by the plaintiff as a witness, and testified that when he took his mortgage from Burch he had no knowledge of the prior mortgage to Burr, that he knew of. The defendant insisted that the decree in the suit of *Randall v. Burch* and others, was no evidence that the mortgage under which the plaintiff claimed, was due at the time of the making of such decree. The justice decided otherwise, and the defendant excepted. The defendant introduced in evidence a decree of foreclosure of a mortgage from J. P. Randall, dated July 21, 1835, on a part of the premises in question, and proved a sale under the same on the 15th of November, 1841; and insisted that by means of such sale the consideration of the mortgage under which the plaintiff claimed failed. The justice decided otherwise, and the defendant excepted. The justice submitted to the jury, as a question of fact, whether Lewis Fort had notice of Burr's mortgage at the time he took his own mortgage from Burch; and the jury, on this question, found in favor of the plaintiff. The defendant's counsel requested the justice to charge the jury that if the plain-

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tiff became the purchaser at the sale under the mortgage from Burch to Lewis Fort, by fraudulently suppressing competition, then the sale was void, and he acquired no title. The justice so charged, but instructed the jury that the testimony of Hoag did not prove the fact sufficiently to raise the question. To this instruction the defendant excepted. The defendant also requested the justice to charge the jury that as the plaintiff had, at the sale, notice of the Burr mortgage, he had no better right than Fort had, and that Fort stood as he would if a bill had been filed against him by Burr, charging him with notice of the prior mortgage; in which case Fort would have been bound to deny notice, unequivocally; and a denial of recollection would have been insufficient. The justice charged the jury that the principle referred to was not applicable, and that the defendant was bound to prove affirmatively that Lewis Fort had notice of the prior mortgage, at the time he took his mortgage. To this opinion the defendant excepted. The plaintiff asked the justice to charge the jury that he, the plaintiff, had made out a perfect title, and that as the decree under which the defendant claimed was not enrolled until after the commencement of this suit, no valid deed could be made until after the enrolment, and that therefore the plaintiff was entitled to recover. The justice decided that under the evidence the mortgagee was in possession, and that being so, his mortgage was a sufficient title to be used as a defence against the plaintiff's claim. To this decision the plaintiff excepted. The plaintiff insisted that by Whiteside's bidding at the sale under the Fort mortgage, he, and all claiming under him, were estopped from setting up his title against the one derived under the Fort mortgage. The justice decided that the bidding by Whiteside did not impair the defence under his title, and the plaintiff excepted.

C. L. Allen, for the plaintiff.

C. F. Ingalls, for the defendant.

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By the Court, PAIGE, P. J. The principal question in this case is, whether any recording act was in force after the 31st day of December, 1829, (when the general repealing act of the 10th of December, 1828 took effect,) applicable to deeds and mortgages executed previous to that date. If all the previous recording acts were absolutely repealed by such repealing act, and if the recording act contained in the revised statutes does not apply to previous deeds and mortgages, then such deeds and mortgages, although not registered or recorded, will be entitled to a preference over all conveyances made and recorded after the 31st of December, 1829. If such shall be found to be the true construction of the general repealing act of the 10th of December, 1828, and of the recording act adopted as a part of the revised statutes, (1 *R. S.* 756 ; 3 *Id.* 130,) it will elicit, in our community, both surprise and regret. Such a construction would, in very many cases, shake the security of titles to lands, and the safety of mortgage investments. Ever since the policy of the registry and recording of mortgages and deeds has been adopted by us, the general opinion and universal belief have been that all laws requiring the registry or record of mortgages or deeds, remained in force, as to all deeds and mortgages to which they were originally made applicable, notwithstanding any subsequent repeal of such laws, or the revision or re-enactment thereof ; unless the new recording act was expressly made applicable to such deeds and mortgages. The policy of the people of this state at a very early day, and long previous to the American revolution, was indicated in favor of the certainty and security as well as the convenience and utility of a registry of mortgages. The general assembly of the colony of New-York, on the 12th of December, 1753, (*Van Schaack's ed. of Laws of N. Y. p. 324.*) passed an act providing for the registry of mortgages executed after the 1st day of June, 1754 ; and declaring that the mortgage first entered on the register should be deemed and taken to be the first or prior mortgage, provided it was made bona fide, and upon a good and valuable consideration. This act was continued in force by the 35th article of the constitution of New-York, of 1777 ; and was re-enacted nearly

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verbatim in an act passed on the 26th of February, 1788. (*Jones & V. ed. of Laws, vol. 2, p. 266, § 4.*) The act of February 26, 1788, was, by its provisions, made applicable to all mortgages made previous to its passage, but subsequent to the 1st of June, 1754, and also to all mortgages made after the passage of the act. In 1801, (*Revised Laws of 1801, p. 480.*) the act of the 26th of February, 1788, was revised, and its provisions substantially re-enacted. In the revised laws of 1813, (1 *R. L.* 372,) the act of 1801 was re-enacted, and the section in relation to the priority of mortgages was adopted, verbatim. In 1822, the act of 1813 was amended by requiring the mortgage to be recorded, instead of being registered. (*Laws of 1822, p. 261.*) The general assembly of the colony of New-York, by an act passed the 30th of October, 1710, authorized deeds to be recorded, and declared that the record of a deed, or a transcript thereof, should be as good and effectual evidence as if the original was produced and proven. (1 *Smith & Liv. Laws, 34.*) In 1794, an act was passed requiring the record of deeds, relating to the military bounty lands, and declaring that every deed not so recorded should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless the same should be recorded before the recording of the deed or conveyance under which such subsequent purchaser or mortgagee should claim. This act was re-enacted in the revision of 1801. (*Rev. Laws of 1801, p. 478.*) The revised act of 1801 required all deeds relating to lands in certain counties, (the military tract,) executed after the 1st of February, 1799, to be recorded. And in the act, the unrecorded deed was declared fraudulent and void against any subsequent *bona fide* purchaser or mortgagee for a valuable consideration. The act contained in the revision of 1801 was re-enacted in the revision of 1813. The act of 1813, like the act of 1801, required all deeds made and executed after the 1st day of February, 1799 to be recorded. In 1823, an act was passed extending the provisions of the act of 1813 to all the counties of the state. (*Laws of 1823, p. 412.*) In the revision of the statutes in 1827 and 1828, it was thought desirable to make the rules

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of priority the same as it respected both deeds and mortgages. These rules, under the acts then in force, were different. A mortgage not recorded was absolutely void, as against a subsequent bona fide purchaser, although the mortgage may have been subsequently recorded before the record of the conveyance of such purchaser. But in all cases between two deeds, as well as between two mortgages, the deed or mortgage first recorded was entitled to priority. Another distinction existed between mortgages and deeds. A mortgage, although first recorded, if not given in good faith and for a valuable consideration, was absolutely void as against any subsequent mortgagee or purchaser. And an innocent assignee of the mortgage without notice of the fraud, was not, like an innocent purchaser from a grantee in a fraudulent deed first recorded, entitled to a preference over a subsequent purchaser or mortgagee. (*Jackson v. Campbell*, 19 John. 281. *Revisers' notes to ch. 3 of 2d part of R. S.*) To abolish these distinctions between deeds and mortgages, and to place them on the same footing, all the previous recording acts in relation to both deeds and mortgages were revised and consolidated in one act, and the term *conveyance* adopted, as embracing both deeds and mortgages. (1 R. S. 756, ch. 3 of part 2, § 1, and p. 762, § 38.) The 1st section of the act provides that every conveyance thereafter made, shall be recorded; and that every conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded. This section retains the principle of the previous acts as to priority between two mortgages; and it extends and applies the same principle of priority to deeds and mortgages, as between each other. Section 22 provides that previous conveyances acknowledged or proved in such manner as entitled them to be recorded under the previous laws, may be recorded in the same manner and with the like effect as if that chapter (the recording act in the revised statutes,) had not been passed. And section 23 authorizes previous conveyances not proved or acknowledged, to be proved or acknowledged in the same manner as conveyances thereafter executed, and directs that when so proved, acknow-

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ledged or recorded they shall have the like effect. These sections were adopted to extend to previous conveyances not recorded the benefits of the recording act, inasmuch as the 1st section of the act of 1827 was in terms confined to subsequent conveyances. These sections were intended to enable previous purchasers and mortgagees, by recording their deeds or mortgages, to protect themselves against either prior unrecorded or subsequent recorded conveyances. The repealing act of Dec. 10th, 1828, repeals, in terms, the previous recording acts in relation to both mortgages and deeds. (3 R. S. 130, § 1, *sub.* 97, 364, 399.) But section 2 (*Id.* p. 155,) provides that nothing therein contained shall be construed to repeal any statute consolidated and published in the revised statutes; and section 5 declares that the repeal of any statutory provision, by that act, shall not affect any act done or right accrued or established, &c. previous to the time when such repeal shall take effect; but that every such act and right shall remain as valid and effectual as if the provision so repealed had remained in force. I cannot persuade myself to believe that the legislature while confirming the policy of the recording acts, and extending their principle, intended, by an unconditional repeal of all the recording acts then in force, to exempt from their operation all previous unrecorded deeds and mortgages; and while professedly attempting to abolish the distinction, as to rules of priority, between mortgages and between mortgages and deeds, which then existed, that they intended to create a still greater distinction between previous and subsequent unrecorded mortgages and deeds. If the previous recording acts were all absolutely and unconditionally repealed, by the repealing act, as the 1st and 4th sections of the new recording act are expressly limited to subsequent conveyances, the result will be, that no recording act will be applicable to previous unrecorded deeds and mortgages, and they must therefore take priority as at common law, according to the times of their execution and delivery. Such a result would lead to great inconvenience, and may be productive of fatal injury, and great injustice to those who have purchased, and made investments upon mortgages, relying upon the records in the

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clerk's office as giving a true history of the title, and incumbrances. A statute is to be construed in conformity to the intent of the legislature, although such construction may seem contrary to the letter. Such intent may be collected from the act itself, from other acts *in pari materia*, or from the cause or necessity of making the statute. A statute ought to be so construed as to suppress the mischief intended to be remedied. And a remedial statute is to be construed liberally. (*Bacon's Ab. tit. Statute I.*) The registry acts are remedial, and must therefore be liberally and beneficially construed. (4 *Cowen*, 605.) The mischief to be suppressed by the recording acts was the perpetration of frauds upon a bona fide purchaser or mortgagee, by means of previous secret conveyances. The statute should be so construed as to make the remedy provided for the mischief effectual. Is it probable that the legislature, while endeavoring to protect bona fide purchasers and mortgagees from this mischief, would intentionally perform only one half the work in hand? Is it probable that the legislature, while protecting purchasers and mortgagees from prior secret conveyances made after the passage of the act, intended to leave them exposed to secret conveyances made previous to that time? Such an intention cannot be imputed to the legislature. It is at war with their acts, and in conflict with the settled policy of the state in relation to the recording of conveyances. Consequences may be considered, in expounding laws, where the intent is doubtful. It is conceded that this principle should be applied with caution. But it is undeniable "where fundamental principles are overthrown and where the general system of the laws is departed from, that the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." (*Per Marshall, Ch. J., United States v. Fisher, 2 Cranch, 358.*)

In the case before the court, if the argument of the defendant's counsel prevails, we must decide that the legislature has expressed with irresistible clearness a design to depart from the settled policy and principles of the recording acts, in relation to all unrecorded deeds and mortgages made previous to the gen-

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eral repealing act of 1828. I do not think that such a design has been expressed by the legislature with irresistible clearness. I think we can vindicate the character of the legislature from the imputation of entertaining such a design, while we preserve the symmetry and secure the universality of the application of the recording acts. I think we can maintain that the recording acts in force at the date of the repealing act, were saved by the second and fifth sections of that act, so far as the question of priority between previous unrecorded and subsequent recorded deeds and mortgages is concerned. The 2d section provides that nothing contained in the repealing act shall be construed to repeal any statute consolidated and published in the revised statutes. All the recording acts in relation to both deeds and mortgages were consolidated and published in the chapter of the revised statutes relating to the recording of conveyances, and were to some extent revised in that chapter. The principle of priority as between mortgages, as contained in the acts of 1813 and of 1822, was adopted in such chapter of the revised statutes; although different words were necessarily used, to declare such principle, in order to accomplish the object intended, of making the rules of priority as between deeds and mortgages, the same as between deeds. I am aware that, as a general rule, where a subsequent statute revises the whole subject matter of a former one, and is evidently intended as a substitute for it, although it contains no express words to that effect, it is a virtual repeal of the former statute. (*Bartlett v. King, Ex'r*, 12 Mass. 563.) But the question here does not arise upon a mere revision of the recording acts; it arises upon the construction to be given to the second section of the general repealing act, in connection with the 5th section of that act.

What did the legislature intend by the word consolidation, as used in the second section? Did they intend to embrace within that term the recording acts? I do not apprehend that a slight change of phraseology, or the addition of some new and distinct provisions, will deprive a combination in one act of several previous acts relating to the same subject, or of several provisions of one act, of its character of consolidation. The question is

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not here upon the strict grammatical meaning of the term consolidation. But the question is, what meaning did the legislature give to it; with what intent did they use it? If the legislature intended, by this word, to continue in force the old recording acts in respect to previous unrecorded deeds and mortgages, except so far as the same were inconsistent with the new recording act, then we are bound to decide that the term consolidation embraced the old recording acts, to the limited extent just mentioned. For we must follow, with reason and discretion, the intent of the legislature, in the construction of the repealing act, although such construction seems to be contrary to the letter of the statute. A statute should be construed so as to have a reasonable effect, in accordance with the intent of the legislature. (3 *Mass. Rep.* 523. 5 *Id.* 380. 7 *Id.* 458. 15 *Id.* 206.) A statute is also sometimes to receive an equitable construction, by enlarging the letter so as to embrace a case within its meaning, where it is within the mischief for which a remedy is provided by the act. (*Bac. Ab. tit. Statute I.* 6.) Bacon says, "In order to form a right judgment whether a case be within the equity of a statute it is a good way to suppose the lawmaker present; and that you have asked him this question: did you intend to comprehend this case? Then you must give yourself such answer as you imagine that he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute." If we test the construction of the general repealing act by this process, we shall have no difficulty in arriving at the conclusion that the term consolidation, in the second section, embraces, to the qualified extent before mentioned, the recording acts then in force. The accuracy of this conclusion will be confirmed by a comparison of the provisions of the new recording act with those of the previous recording acts. On examination we shall find that many of the provisions of the old recording acts are either literally or substantially copied into the new recording act. Thus section 3 of the new recording act is, with one or two exceptions, in the same words as section 3 of the act of the 17th of April, 1822.

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Sections 10, 11 and 12 of the new recording act are substantially copies of section 2 and of the last clause of section 1 of the act of April 12, 1813. Section 4 of the new recording act is nothing but a consolidation of the provisions of previous acts in relation to the proof and acknowledgment of deeds. Section 16 and the first clause of section 17, and section 24 of the new recording act are substantially copies of section 5 of the act of April 12, 1813. Sections 22 and 23 of the new recording act, which authorize previous deeds and mortgages which have been proved or acknowledged under the previous laws, to be recorded, and such as have not been proved or acknowledged to be proved or acknowledged and recorded in the manner prescribed by that act, show very clearly the understanding of the legislature that previous unrecorded conveyances were to be postponed to subsequent recorded conveyances. The contrary hypothesis would render these sections, at least so far as they relate to the record of previous conveyances, wholly useless. These sections were adopted to give to previous purchasers and mortgagees, whose conveyances were unrecorded, the benefits of the recording act, to enable them, by recording their deeds and mortgages, to protect themselves against prior unrecorded and subsequent recorded conveyances. If by the absolute repeal of all the previous recording acts, they, upon the principles of the common law, would be entitled to priority over all subsequent conveyances, the provisions for their relief in sections 22 and 23 were unnecessary. And section 22 of the new recording act, which is directly applicable to the mortgage from Burch to Burr under which the defendant claims, that mortgage having been previously executed and acknowledged, necessarily implies that the previous recording acts in relation to mortgages, so far as the record of the mortgage and the question of priority depending thereon is concerned, remained in force. That section provides that the conveyance previously acknowledged or proved shall be entitled to be recorded, in the same manner and with the like effect as if that chapter (the new recording act) had not been passed.

Some light may be thrown upon the question under discussion by an examination of the 5th section of the repealing act.

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That section declares that the repeal of any statutory provision, by that act, shall not affect any act done, or right accrued or established, previous to the time when such repeal shall take effect; but that every such act and right shall remain as valid and effectual as if the provision so repealed had remained in force. Now although we cannot say, as required by the plaintiff's counsel, that Burr's omission to record was an act done, yet in order to carry out the manifest intent of the legislature; cannot we say that the act done and the right accrued referred to, was the acknowledgment of the mortgage and the qualified lien of Burr acquired under his unrecorded mortgage; a lien subject to be postponed to any subsequent mortgage which should be first recorded; and that within the meaning of the section it was the acknowledgment, and this qualified lien of Burr, which was to remain as valid and effectual as if the recording acts had remained in force. That is, they were to remain as valid and effectual as if these acts had continued unrepealed; not more valid and effectual. In other words, the acknowledgment shall remain valid and effectual without a new acknowledgment, and the lien of Burr—such lien as he had under the previous recording acts, a qualified lien, to be postponed to every subsequent recorded mortgage—shall remain as valid and effectual as it was under the previous recording acts, and not more so. Upon this construction of the fifth section of the repealing act, the recording act of the 17th of April, 1822, continued in force, to limit and qualify the lien of Burr, and to preserve, as applicable to his mortgage, the rules of priority established by that act.

A long and uninterrupted practice under a statute is regarded as good evidence of its construction. (*McKeen v. Delancy's Lessee*, 5 *Cranch*, 22.) A general repealing act accompanied both the revisions of 1801 and 1813. (*Laws of 1801*, p. 619. *Laws of 1813*, vol. 2, p. 556.) Such repealing acts only contained a saving clause like that contained in section 5 of the general repealing act of 1828, declaring that the repeal should not affect acts done or rights accrued, without any exception as to statutes consolidated in the revisions of those years. And I

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am not aware that it has ever been disputed that the recording or registering acts in force previous to those revisions, notwithstanding the repeal, continued in force as to previous deeds and mortgages, except so far as they may have been inconsistent with the revised acts of those years. And I believe that the uniform practice has been, in searching the records in reference to the purchase of lands, and investments on mortgage, to regard such recording and registering acts as applicable to all deeds and mortgages executed while they were in force; and that upon this assumption, and under the belief that the records in the clerk's office contain a true history of the title to lands, and of the incumbrances thereon, lands are uniformly purchased, and investments on mortgage made. In *Jackson v. How*, (19 *John*. 83,) Spencer, Ch. J. says, "with respect to purchasers, they purchase under faith in the title as appearing on the record, and the record is part of their title." And Chancellor Walworth recognizes the principle that the records are a part of the title, and that purchasers and mortgagees have a right to rely on the records as giving a true history of the title. (*Ledyard v. Butler*, 9 *Paige*, 136.)

The general system of legislation upon the subject matter of a statute may be taken into view in order to aid the construction of a particular statute relating to the same subject. (1 *Pick*. 248, 254. 10 *Id*. 241.) The general system of legislation heretofore adopted in relation to the recording acts, when the laws were revised, has been to revise and re-enact in the revised laws the previous recording acts, and to accompany the revision by a general repealing act, saving acts done or rights accrued under the previous acts; and to regard the previous recording acts as remaining in force as to deeds and mortgages executed while they were in existence as laws, except as to such parts thereof as were inconsistent with the new recording acts. In the present case, by deciding that the old recording acts remain in force, as to the rule of priority of previous unrecorded conveyances, no vested right of Burr, or of those claiming under him, will be impaired. Until Burr recorded his mortgage he could only claim a priority over a subsequent recorded mortgage, upon the ground

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that the subsequent mortgagee had notice of his prior unrecorded mortgage. Burr, by not recording his mortgage, as required by the existing recording acts, subjected his mortgage to the liability of being postponed to a junior mortgage which should be first recorded. And there is no reason why he should be released from this liability, the result of his own negligence; especially when, by so doing, the mortgagor will be enabled to perpetrate a fraud upon a subsequent bona fide mortgagee, who took his mortgage without notice of the prior mortgage of Burr. When Burr took his mortgage, the law declared that unless he recorded his mortgage it should be postponed to a subsequent mortgage, in case such subsequent mortgage should be first recorded. He has no claim, in justice or equity, to be relieved from the operation of that law, to the prejudice of a subsequent mortgagee who took his mortgage without notice of the prior incumbrance of Burr, and upon the faith that the recording act would protect him against prior secret unrecorded conveyances. The recording acts are remedial statutes, and must be liberally and beneficially construed. The act for recording mortgages is a valuable substitute for the English practice of depositing the title deeds with the mortgagee; and it has effectually protected subsequent purchasers and mortgagees from the frauds of the mortgagor, and from the mischief of prior secret and concealed mortgages. (2 *John*. 522, 523, *per Kent*, Ch. J. *Cruise's Dig. tit. 15, ch. 5, § 11. Goodtitle v. Morgan*, 1 *Term Rep.* 762.) No construction should be given to a recording act unless demanded by its plain and unambiguous language, and the manifest intent of the lawmakers, to limit or contract its operation.

We can not, I think, for the reasons above stated, avoid coming to the conclusion that by the true construction of the general repealing act of 1828, and of the recording act of 1827, the previous recording acts remain in force in respect to previous unrecorded deeds and mortgages, at least so far as such acts relate to the rule of priority between such deeds and mortgages, or between them and subsequent conveyances.

The motion for a nonsuit upon the ground that the order confirming the master's sale was not entered until after the com-

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mencement of the suit, was properly denied. The title passed by the master's deed. The order to confirm was not necessary to pass the title to the purchaser. The master was authorized to convey after the enrolment of the decree, and before the confirmation of the report of the sale. (*Rule 111, Old Chancery Rules. 4 Hill, 173.*) But all doubt on the question is removed by the doctrine of relation. The confirmation of the sale related to the date of the deed. (*4 Hill, 173.*) The defendant is a tenant of Whiteside, who is the grantee of Burr, to whom the prior mortgage was given by William Burch. Should the evidence of the enrolled decree, in the suit to foreclose Burr's mortgage, be deemed defective, the defendant, being the tenant of Whiteside, may nevertheless, upon the cases of *Phyfe v. Riley*, (15 *Wend. 253*,) and of *Jackson v. Bowen*, (7 *Cowen, 13*,) claim the right to protect his possession as the assignee of Burr's mortgage. The deed from Burr to Whiteside carried all the interest of the former as mortgagee, as well in the debt as in the land mortgaged. (6 *Cowen, 20.*) In *Phyfe v. Riley*, (*supra*,) it was held that ever since the adoption of the revised statutes, which take away the remedy of the mortgagee by ejectment, the mortgagee in possession may protect such possession by force of his mortgage. This decision may perhaps be questioned, as the mortgage is now considered as a mere security for money; and as the mortgagor is regarded, both at law and in equity, as the owner of the freehold. (4 *Kent's Com. 157, 160, note b. 2 Cowen, 196, 231. 19 John. 325. 11 Id. 534.*)

But I think that the evidence of the proceedings in the suit for the foreclosure of Burr's mortgage was, by the rules of the common law, sufficient. (1 *Phil. Ev. 386, 392. 5 Paige, 304.*) The revised statutes do not abrogate any of the common law rules of evidence in relation to the proof of records and judicial proceedings. (5 *Cowen, 165. 2 R. S. 404.*) The omission to enrol the decree in the foreclosure suit of Burr can not affect the title of the purchaser under the decree. The title passes by the master's deed. (4 *Hill, 171.*) The evidence of the declarations of Lewis Fort, made in 1837, admitting his knowledge of the

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prior mortgage of Burr, was properly rejected. Fort was himself a competent witness to prove such knowledge. (*Alexander v. Mahon*, 11 John. 185. 15 Id. 493.) The declarations and admissions of a former owner of a chose in action or of other personal property, are not evidence against his assignee or vendee. (8 Wend. 490. 7 Id. 256. 1 Hill, 612. 7 Cowen, 752.)

The decree in the suit of *Randall v. Burch et al.* was evidence that the condition of the mortgage from Burch to Lewis Fort had become forfeited, by the non-payment of the moneys which Burch therein obligated himself to pay. The decree was at least prima facie evidence of such fact.

The objection of the defendant that the consideration of the mortgage from Burch to Fort failed, by means of the foreclosure of the mortgage from S. P. Randall to L. Randall, and the sale of the mortgaged premises under the decree of foreclosure, was not well taken. Burch, in his bond and mortgage to Fort, had assumed to pay \$1150 of the mortgage of L. Randall, and the foreclosure of the latter mortgage was founded on the non-payment of that money which Burch ought to have paid. The charge of the justice was unobjectionable.

The evidence of the witness Hoag, in relation to the arrangement made by the plaintiff with him, to induce him to stop bidding at the sale under the Fort mortgage, did not affect the validity of the sale to the plaintiff. The sale was a judicial sale. It was regularly confirmed by the court, and the master's deed founded thereon was executed and delivered to the plaintiff. The cases of *Doolan v. Ward*, (6 John. 194,) *Wilbur v. How*, (8 Id. 444,) and of *Thompson v. Davies*, (13 Id. 112,) cited by the defendant's counsel, were actions in affirmance of contracts, between parties to the same. The tendency of the contracts was to prevent competition at the sale. This rendered the contracts illegal, because they were contrary to public policy. The case of *Howard v. Castle*, (6 Term Rep. 642,) was an action against a bidder at an auction, to compel him to complete the contract. The contract was held void because the owner had employed puffers to bid for him. The case of *Rexwell v. Christie*, (Coup. 396,) was an action by the owner against the auctioneer for

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selling a horse at the highest price bid for him, contrary to the owner's express directions not to let him go under a larger sum named. It was held that the action would not lie, because the direction to the auctioneer implied that a person was to be privately employed to bid for the owner. A contract, although illegal, if executed, cannot be rescinded by parties *in pari delicto*. The sale to the plaintiff could only have been called in question in the suit of *Randall v. Burch and others*. It can not be assailed in a collateral suit. Its validity has been adjudged by the order of confirmation.

The charge of the justice was correct in relation to the notice to Lewis Fort of the prior mortgage of Burr. The defendant was bound to prove, affirmatively, that Lewis Fort had notice of the prior mortgage. This notice must be direct and positive, or implied. A notice which is barely sufficient to put a party on inquiry is not sufficient. Nor is a suspicion of notice sufficient. (4 *Ken's Com.* 171, 2. *Tuttle v. Jackson*, 6 *Wend.* 226, *per Chancellor Walworth*. 3 *Paige*, 437. 1 *Hill*, 568, 571. 10 *John.* 457. 9 *Id.* 163. 8 *Id.* 137; 2 *John. Ch.* 182, *S. C.* 15 *John.* 555, 567. 12 *Id.* 452. 19 *Wend.* 339.) Where a subsequent mortgagee swore, in his answer, that to his belief he did not know of a prior unregistered judgment, when he took his mortgage, it was held not sufficient to justify the court in breaking in upon the registry act, although the defendant was contradicted by one witness. (*Hine v. Dodd*, 2 *Atk.* 275. *Pow. on Mort.* 639, 640.)

Whiteside, by bidding at the sale under the Fort mortgage, did not estop himself from disputing the plaintiff's title, derived under that mortgage. Whiteside was in possession of the premises, by his tenant; and he gave notice at the sale that he claimed the premises as a purchaser from Burr. His bidding when every one who bid knew of his claim, could not possibly work any estoppel. (4 *John.* 216.)

Judgment must be rendered for the plaintiff, and the motion for a new trial must be denied.

SAME TERM. *Before the same Justices.*

STEWART vs. WELLS and JOHNSON

A mere levy upon personal property, by an officer, where it is not authorized by law, is, without either a sale or removal, a trespass.

To maintain either replevin or trespass it is not necessary to show an actual, forcible dispossession of the plaintiff. Any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain either action.

As a sheriff, by levying on goods and chattels which are not the property of the defendant in the execution is a trespasser, if the plaintiff in the execution directs the levy to be made, he is a trespasser also.

The officer, in such case, is the plaintiff's servant or agent, and trespass or replevin will lie against either of them.

In an action of replevin against a sheriff for the act of his deputy, it is sufficient for the plaintiff to show that the deputy was a deputy of the defendant, and that he acted *colore officii*, in order to make his declarations in relation to his official acts, admissible in evidence against the sheriff.

The declarations of a deputy sheriff, made within the scope of his authority and while the process is in his hands and in the course of execution, are to be taken as part of the *res gestæ*, and bind his principal.

Proof of a person's being deputy sheriff, and of his advertising property for sale under an execution, as such, is sufficient to authorize evidence of his declarations, without proving the issuing and delivery of an execution to him.

THIS was an action of replevin, tried at the Washington circuit in June, 1847, before JOHN WILLARD, circuit judge. It was proved that one Trumbull was a deputy of the defendant Wells, who was sheriff of the county of Washington, in 1842, and that Trumbull advertised for sale, as deputy of Wells, the property of the plaintiff. The advertisement stated that the personal property in question had been seized and taken by virtue of an execution against George Stewart, issued out of the supreme court, (which personal property was described therein,) and that such property would be sold on the 12th of October, 1842. The advertisement was dated October 1, 1842, and signed L. Wells, sheriff, by L. Trumbull, deputy. The evidence of the advertisement was objected to. It was proved that Trumbull, about the time of the date of the advertisement,

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stated that he had levied on some property by virtue of an execution against George Stewart, and that the property was claimed by the plaintiff. It was also proved that the defendant Johnson, both before and after the supposed levy, said he had made a levy on certain property claimed by the plaintiff, for the debt of George Stewart, and that Trumbull, the deputy sheriff, was going to sell some property, and that he, Johnson, had directed the levy to be made. Johnson claimed to have a judgment against George Stewart. It was proved that the property levied upon belonged to the plaintiff. No objection was made to proof of the declarations of Trumbull. The plaintiff's counsel read in evidence a notice to the defendants' counsel, with an admission of service, to produce on the trial the execution under which the levy was made. The execution was not produced.

The defendants' counsel moved for a nonsuit, on the ground that the taking was not proved, as against either of the defendants. The judge granted the nonsuit, and the plaintiff excepted.

M. Fairchild & Wm. Hay, for the plaintiff.

C. L. Allen, for the defendants.

By the Court, PAIGE, P. J. The principle is well established that a mere levy upon personal property, by an officer, where it is not authorized by law, is, without either a sale or removal, a trespass. After the seizure under the execution the goods are, in judgment of law, in the possession of the officer; and the person with whom they are left is regarded as his servant. (*Wheeler v. McFarland*, 10 *Wend.* 322; *S. C.* 26 *Id.* 467, 484. 6 *John.* 196. 20 *Id.* 465.) Replevin lies in all cases where trespass *de bonis asportatis* will lie. (10 *Wend.* 322, 349. 7 *John.* 142. 20 *Id.* 467.) Replevin lies for any tortious or unlawful taking of the property of another. To maintain either replevin or trespass it is not necessary to show an actual, forcible dispossession of the plaintiff. Any unlawful interfer-

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ence with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain either action. As a sheriff, by levying on goods and chattels which are not the property of the defendant in the execution is a trespasser, if the plaintiff in the execution directs the levy to be made, he is a trespasser also. The officer, in such case, is the plaintiff's servant or agent, and trespass or replevin will lie against either of them. (*Allen v. Crary*, 10 *Wend.* 349.) As in this case the defendant Johnson directed Trumbull to make the levy, the action, as to him, was sustained. It is not denied that either trespass or replevin would have lain against Trumbull; but it is objected that the evidence is insufficient to implicate the defendant Wells. It is insisted, by the defendants' counsel, that the acts and declarations of Trumbull were inadmissible in evidence, because no proof was given of the issuing and delivery of an execution to him. A deputy sheriff is regarded as the agent of the sheriff. His declarations, made within the scope of his authority and while the process is in his hands and in the course of execution, bind his principal. The admissions are then to be taken as a part of the *res gestæ*. (*Mott v. Kipp*, 10 *John.* 478. *Benjamin v. Smith*, 4 *Wend.* 334, 394, 397. *Cowen & Hill's Notes*, 191. *North v. Miles*, 1 *Camp.* 389, 391, *note*.) It was proved that Trumbull was the deputy of Wells. And his advertisement of the property as the deputy of Wells, was also proved. This advertisement was an act *colore officii*—not a mere declaration. I think the proof of his being deputy, and his advertisement of the property, was sufficient to authorize evidence of his declarations. His declarations were not objected to. The advertisement set forth the issuing and delivery of the execution to the sheriff and the levy upon the property. Trumbull also, about the time of the date of the advertisement, admitted that he had levied on some property by virtue of an execution against George Stewart, which the plaintiff claimed. In *McFarland v. Wheeler*, (26 *Wend.* 468,) on the trial in the common pleas, proof of the declarations of the deputy, without the production of the execution, was objected to. The objection was overruled, and the supreme court

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expressly held that this ruling of the common pleas was correct. Although the judgment of the supreme court was reversed, the correctness of the decision of the supreme court, on this point, was not controverted in the court of errors.

The decision of the supreme court in *McFarland v. Wheeler* disposes of the only real question in this case. Parol evidence of the existence of the execution was proper, as its contents were not sought after. (2 *Cowen & Hill's Notes*, 1209 to 1212. 1 *Id.* 547, 549.) It was only necessary to show that there was an execution, in order to connect Trumbull with the sheriff; to show that Trumbull was acting *colore officii*. Where there is no question as to the existence of a suit, the time of its commencement may be proved by parol, without producing the writ; because for that purpose it is not necessary to prove the contents of the writ. (2 *Cowen & Hill's Notes*, 1077.) The execution was not the foundation of the action. The admission of the sheriff that Trumbull, as his deputy, levied by virtue of an execution, would have been competent without production of the execution; as it proved the only fact necessary to be shown to make the sheriff liable, viz. that the deputy, in making the levy, acted as his agent. In cases where it has been held that the admission of the party is not competent evidence, it was sought to prove the existence of a record, or the existence of facts which could not be proved by parol; and where the fact sought to be established was the foundation of the action or defence. (10 *John.* 248. 6 *Id.* 9. 1 *Cowen & Hill*, 544. 8 *Wend.* 486.) In a case like the present it is sufficient to show that the deputy sheriff was a deputy of the sheriff, and that he acted *colore officii*, in order to make his declarations in relation to his official acts, at the time, admissible in evidence against the sheriff.

The defendants ought, on the trial, to have taken the specific objection that the execution was not produced or proved. If this objection had been taken, non constat but that the objection would have been obviated by the production of the requisite evidence. The only ground assigned for the nonsuit was that the taking was not proved, as against either of the parties; not

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that the evidence of the taking by Trumbull and Johnson was not sufficient to implicate Wells, because the execution was not proved. Evidence of the taking by Trumbull and Johnson was abundant. Trumbull admitted he levied on the plaintiff's property by virtue of an execution against a third person; and Johnson admitted that he directed such levy to be made. This made them both trespassers. The nonsuit was at least erroneous as to Johnson.

The nonsuit must be set aside, and a new trial granted.

SAME TERM. *Before the same Justices.*

HALL vs. SUYDAM.

To sustain an action for a malicious prosecution, the plaintiff must show that the prosecution originated in the malice of the defendant, without probable cause. Proof of express malice is not enough, without showing also the want of probable cause.

What amounts to probable cause.

The question of probable cause does not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor, concerning such guilt or innocence.

The want of probable cause cannot be inferred from express malice, but malice may be implied from the want of probable cause.

The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged, to show probable cause, or the contrary, are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law.

Where there is a conflict of evidence, and the credibility of evidence is to be passed upon, it is proper for the judge to submit it to the jury to find whether the facts relied on as evidence of probable cause, or of the want of probable cause, are true. And, if requested by the defendant's counsel, it is the duty of the judge to state to the jury his opinion, distinctly, whether probable cause is or is not established, if they find the truth of the facts relied on by the defendant as evidence of probable cause.

If a party lays the facts of his case fully and fairly before counsel, and acts, in good faith, upon the opinion given him by such counsel, (however erroneous that opinion may be,) it is sufficient evidence of a probable cause, and is a

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good defence to an action for a malicious prosecution, or for a malicious arrest.

But in such a case it is properly a question for the jury whether such party acted bona fide on the opinion given him by his professional adviser, believing that the plaintiff was guilty of the crime of which he was accused, or that he had a good cause of action against the plaintiff.

Good faith merely, in making a criminal charge against another, is not sufficient to protect the party from liability. There must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person charged was guilty of the crime of which he was accused, to make out such a probable cause as will be a defence to an action for a malicious prosecution.

. THIS was an action against the defendant for a malicious prosecution. The suit was tried before Justice WILLARD, at the Saratoga circuit, in August, 1848. On the trial it appeared that the defendant, on the 1st of May, 1846, made a complaint on oath, against the plaintiff, before a justice of the peace, for stealing his wagon. The plaintiff was arrested on this charge and brought before two magistrates; when an examination was had. And after witnesses were examined against and in behalf of the plaintiff, he was discharged. Evidence was introduced on the trial, by the plaintiff, tending to show that the charge was made against him without probable cause. And evidence was given by the defendant for the purpose of showing probable cause. It appeared that the plaintiff was not discharged by the magistrates until after he had introduced evidence to controvert the charge against him. One of the justices testified that according to his recollection they, at the close of the testimony in support of the prosecution, denied a motion made for the plaintiff's discharge, and held that a prima facie case had been made out against him. It appeared that the plaintiff took the wagon from the defendant's yard, in the day time, claiming it as his own, under a bill of sale to him from his brother, Calvin Hall. The defendant was told, before making the complaint, that the plaintiff had taken the wagon and claimed it under this bill of sale. It was proved that previous to the complaint the defendant said he had sold the wagon to Calvin Hall. The defendant purchased the wagon from one Moon, and paid part of the purchase money, and Calvin Hill

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afterwards paid the residue. The bill of sale from Calvin Hall to the plaintiff was proved. In March or April, 1846, Calvin Hall applied to the defendant to purchase the wagon from him, but did not make the purchase. It was proved that the defendant took the advice of counsel in relation to the complaint against the plaintiff; and that the counsel applied to, advised the defendant to take out a criminal warrant against the plaintiff. It appeared that the defendant made the statement of the facts to such counsel; but omitted to inform him of the bill of sale from Calvin Hall to the plaintiff. The defendant told such counsel that the plaintiff, on the day he took the wagon, sent word to him that he had taken it. The plaintiff, on the 5th of May, resold the wagon to Calvin Hall. Considerable evidence was given on both sides on the subject of probable cause for making the criminal charge against the plaintiff. And some evidence was given by the defendant tending to show that the sale from Calvin Hall to the plaintiff was collusive. The defendant testified, before the magistrates, that the wagon belonged to him, and that it had been taken away from his father's yard. The justice charged the jury that the action could not be sustained without showing the absence of probable cause, in addition to proof of express malice; that the question of probable cause did not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. And he referred to the case of *Foshay v. Ferguson*, (2 Denio, 617,) by way of illustration of the principles of the action, and stated the same to the jury as declared by Judge Bronson in that case. The justice also charged the jury that if the defendant, in making the complaint before the magistrate, acted upon the advice of counsel, given upon a full and fair statement of the facts within his knowledge, that would be a defence to the action. The defendant excepted to the charge generally; and requested the justice to charge as follows:

1. If the jury believed, from the evidence, that the defendant acted in good faith in taking out the warrant, it was a defence.
2. If the jury believed that the defendant acted bona fide in taking out the warrant, on the advice of counsel, upon a full

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and fair statement of the facts, that was a defence. 3. If the jury believed the wagon belonged to the defendant and the plaintiff took it without the defendant's consent, that was probable cause, and a defence. 4. If the plaintiff acted in bad faith in taking the assignment from his brother, of the wagon, knowing that his brother had no title to it, that was a defence. 5. If the jury believed, from the evidence, that the transfer from Calvin Hall to the plaintiff was a contrivance to get the wagon out of the defendant's possession, that was a defence. 6. That the evidence of probable cause was a question for the jury. 7. That probable cause was a fact for the jury. The justice remarked that his charge covered the whole ground, and he refused to modify his charge as requested, and the defendant excepted to such decision.

W. A. Beach, for the plaintiff.

J. Brotherson, for the defendant.

By the Court, PAIGE, P. J. To sustain an action for a malicious prosecution, the plaintiff must show that the prosecution originated in the malice of the defendant, without probable cause. Proof of express malice is not enough, without showing also the want of probable cause. Probable cause has been defined, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. (2 *Denio*, 619. 3 *Wash. C. C. Rep.* 37.) Although the plaintiff is entirely innocent, if the defendant shows he had reasonable grounds for believing him guilty, at the time the charge was made, the action can not be sustained. The question of probable cause does not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. (*Foshay v. Ferguson*, 2 *Denio*, 619. 2 *Phil. Ev.* 253.) The want of probable cause cannot be inferred from express malice, but malice may be implied from the want of probable cause. (2 *Phil.*

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Ev. 256, 257. 2 *Wend.* 427.) The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged, to show probable cause, or the contrary, are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. (2 *Phil. Ev.* 255, 256. 1 *Wend.* 352.) Where the circumstances relied on as evidence of probable cause are admitted by the pleadings, it belongs to the court to pronounce upon them; and where these circumstances are clearly established by uncontroverted testimony, or by the concession of the parties, and they fully establish a probable cause, the court may refuse to submit the cause to the jury, and order the plaintiff to be nonsuited. (2 *Wend.* 428, *Masten v. Deyo, per Marcy, J.*) If, however, the facts are controverted, if in any wise the weight of conflicting testimony is to be ascertained, or the credibility of witnesses estimated, the evidence must go to the jury. (2 *Wend.* 429, *per Marcy, J.*) Where the facts relied on as evidence of probable cause are controverted, it is the duty of the judge to state his opinion distinctly to the jury, whether probable cause is or is not established, if the evidence introduced by the defendant proves to their satisfaction the truth of the facts on which the defendant relies. (2 *Wend.* 430.) The defendant has a right to call upon the judge to instruct the jury as to the law involved in the question of probable cause, and whether the facts relied on in the defence, on the supposition that they should be found true by them, made out a probable cause. (2 *Wend.* 430.) In *Pangburn v. Bull*, (1 *Wend.* 345,) and in *McCormick v. Sisson*, (7 *Coven*, 718,) it was held to be error for the judge to submit the question to the jury, whether there was probable cause, without instructing them whether the facts relied on, if true, made out a probable cause. Submitting to the jury the question whether there was probable cause or not was regarded, in these cases, as submitting both the law and the fact to the jury. (6 *Wend.* 421. 17 *Id.* 227.) In *Masten v. Deyo*, (2 *Wend.* 425,) the defendant insisted that the question of probable cause was a question of law, for the court to decide; and asked the judge to charge the jury, that the plaintiff was not entitled to

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recover. The judge charged the jury that it was their province to decide, whether there was sufficient evidence of probable cause. The supreme court held that this was a misdirection, and granted a new trial. In *Ulmer v. Leland*, (1 *Greenl. Rep.* 135,) a like request was made to the presiding judge, and a like charge was made, and the superior court of Maine held the charge to be erroneous, and granted a new trial.

If a party lays the facts of his case fully and fairly before counsel, and acts in good faith, upon the opinion given him by such counsel, (however erroneous that opinion may be,) it is sufficient evidence of a probable cause, and is a good defence to an action for a malicious prosecution, or for a malicious arrest. But in such a case it is properly a question for the jury whether such party acted bona fide on the opinion given him by his professional adviser, believing that the plaintiff was guilty of the crime of which he was accused, or that he had a good cause of action against the plaintiff. (*Ravengol v. Mackintosh*, 2 *Bar. & Cress.* 691.) In *Pangburn v. Bull*, (1 *Wend.* 352,) which case came up by writ of error from the Albany common pleas, although the supreme court held that the common pleas erred in submitting to the jury the question of probable cause, that court nevertheless affirmed the judgment of the court below because it appeared, on the face of the bill of exceptions, that from the facts undisputed at the trial there was a want of probable cause. Woodworth, J. in that case says, "the verdict ought not to be set aside for the error of the court below in this respect, because this court are called on to pronounce on that question; and if they see that the jury have not erred in point of law, although the charge was erroneous, no injury has been done to the defendant below of which he has a right to complain."

In this case there was conflicting evidence, and the credibility of witnesses was to be passed upon. It was proper, therefore, for the learned justice to submit it to the jury to find whether the facts relied on as evidence of probable cause, or of the want of probable cause, were true. And if he had been requested by the defendant's counsel, it would have been his duty to state to the jury his opinion, distinctly, whether probable cause was or

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was not established, if they found the truth of the facts relied on by the defendant as evidence of probable cause. This request, however, the defendant's counsel omitted to make; but on the contrary requested the justice to charge the jury that the question of probable cause was a question of fact, to be decided by them. If the attention of the learned justice had been called to the well settled principle that the question of probable cause was a mixed question of law and fact, he would undoubtedly have distinctly left to the jury alone to find the truth of the facts relied on as evidence of probable cause, and would have declared his opinion to them, whether such facts, if found by them to be true, amounted to probable cause, or not. The exception to the charge is too general, to allow the defendant now to object that the justice did not state his opinion to the jury whether the facts relied on by the defendant, if true, amounted to a probable cause. The other parts of the charge are altogether unobjectionable. The defendant's counsel requested the justice to charge the jury that if the jury believed the defendant acted in good faith in taking out the warrant, it was a defence. The justice substantially so charged. He charged that the question of probable cause depended not on the actual guilt or innocence of the plaintiff, but on the belief of the prosecutor concerning such guilt or innocence. This was in effect saying that the defendant was not liable in this action if he acted in good faith in taking out the warrant. But good faith merely is not sufficient to protect the defendant from liability. There must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty of the crime with which he was charged, to make out such a probable cause as will be a defence. Good faith merely may be based on mere conjecture, on unfounded suspicion—supported by no circumstances. The charge was in strict conformity to the second request. If the wagon did belong to the defendant, and the plaintiff took it without the defendant's consent, that may have been a mere trespass; and to charge that that was a defence would have been a misdirection. It would also have been a misdirection if

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the justice had charged as requested in the 4th and 5th requests of the defendant. If the plaintiff did act in bad faith, in taking the assignment of the wagon from his brother, knowing that his brother had no title to it ; or if the transfer from Calvin Hall to the plaintiff was a contrivance to get possession of the wagon ; it would have been error to declare to the jury that either or both of these facts amounted *per se*, in law, to a defence to the action. At most these facts could only have been regarded as circumstances, in connection with other facts tending to establish probable cause for making the charge of larceny. The charge of the justice did not conflict with the 6th request. He did not take from the jury the right to find the truth of the facts relied on as evidence of probable cause. The 7th request was improper. Whether facts, when found to be true, amount to probable cause, is a question of law for the court, not of fact for the jury.

I am inclined to believe that the facts contained in the bill of exceptions, which are uncontroverted, are sufficient in law to make out a want of probable cause for the prosecution of the plaintiff on the charge of larceny. It appears that the plaintiff took the wagon from the premises of the defendant's father, in the day time, professedly claiming it under a bill of sale from his brother ; that the same day he took the wagon he told a witness with whom the top and seat had been left, to be repaired, that he had taken it, and that he claimed it as his own, and showed him the bill of sale under which he claimed it, and sent word by this witness to the defendant, that he had taken the wagon. It also appears that this witness, the same day, delivered to the defendant the plaintiff's message, and told the defendant that the plaintiff claimed the wagon under the bill of sale from his brother. And it also appears that the defendant received all this information before he made the complaint against the plaintiff for stealing the wagon. It seems to me that these facts were sufficient evidence of the want of probable cause. In *Weaver v. Townsend*, (14 *Wend.* 192,) which was an action on the case for a malicious prosecution in causing the plaintiff to be arrested on a charge for feloniously taking prop-

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erty, it was held that the knowledge of the defendant, when he made the complaint, that the plaintiff claimed and had at least a prima facie right to the property, was sufficient evidence of a want of probable cause.

The motion for a new trial must be denied.

SAME TERM. *Before the same Justices.*

BROWNING and others vs. HART and others.

H., who was largely in debt, and embarrassed in his business, and unable to pay his debts, sold his stock of goods in his store to M. for \$1500, and received from him two notes for \$400 each, payable in one and two years after date, and allowed the residue of the purchase money to be retained by M. in payment of a debt of \$63 which H. owed him, and to secure him for his liabilities as endorser or surety for the then late firm of M. & H., but which liabilities were never paid by M. It was known to M. at the time of the purchase, that H. had been prosecuted, and was insolvent. *Held* that such sale and purchase were fraudulent and void as against creditors.

An assignment, executed by a man in embarrassed or insolvent circumstances, of his property, in trust for the benefit of creditors, is valid if it unconditionally and absolutely devotes the whole of the assigned property to the payment of his debts; provided it be made without any intent to hinder, delay, or defraud his creditors.

And if such assignment is valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it.

Although the appointment of the assignor as his agent, by the assignee, to collect the choses in action assigned, is to be regarded with suspicion, yet that circumstance alone, will not afford sufficient evidence of an original intent on the part of the assignor and assignee, or of either of them, to defraud creditors.

The right of creditors to set aside a fraudulent sale and transfer of his property made by a debtor, will not be taken away by a subsequent voluntary assignment made by such debtor of his property and effects to a trustee for the benefit of certain preferred creditors.

IN EQUITY. This was an appeal from a decree of Vice Chancellor Cushman, setting aside a general assignment made by the defendant Hart, to the defendant Livingston, in trust for

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the payment of the debts of Hart. The bill was a creditor's bill against Hart as a judgment debtor; and Miller was made a party to the bill on the ground that he was a debtor of Hart, or had in his possession property, or choses in action, in which Hart had an interest. The bill alleged that the assignment to Livingston was fraudulent, and that it was not accompanied by an immediate delivery and change of possession of the property and choses in action assigned; and that Livingston was not responsible for \$10. The bill claimed a discovery of every assignment or transfer which the defendants, or either of them, had made of their property, debts, or other effects, and charged that if the defendants, or either of them, should pretend that they had made any assignment or transfer of their property or effects, such assignment or transfer was merely colorable, and made with a view of protecting the property or effects so assigned, and of placing the same beyond the reach of the plaintiffs' judgment. The joint answer of the defendants disclosed that the defendant Hart, on the 13th day of October, 1840, sold his stock of goods in his store, to the defendant Miller, for the sum of \$1500; and that on the 16th of October, 1840, he executed and delivered to the defendant Livingston a general assignment of all his personal property and choses in action, (except such articles as are by law exempt from execution,) in trust for the payment of his debts. The answer alleged that the defendant Livingston took immediate possession of the goods and effects assigned, and had ever since had the charge and control and still had the charge, control, and possession thereof, except as to one of the \$400 notes given by Miller on the purchase of the goods in the store, and as to the household furniture. The defendants Hart and Miller alleged, upon information and belief, that Livingston was honest and responsible for any amount of property which might come into his hands under the assignment. Hart denied that either the sale to Miller, or the assignment to Livingston, was colorable, and made with a view of protecting his property, or of enabling him to control and enjoy it. And all the defendants denied, generally, all fraudulent intent charged against them in the bill.

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G. Stow, for the plaintiffs.

D. P. Corey, for the defendants.

By the Court, PAIGE, P. J. Upon the facts disclosed in the answer I cannot see how the sale, by Hart, of his stock of goods in his store to Miller, can be upheld. Hart and Miller admit, in the answer, that on the 13th of October, 1840, the day of the sale, Hart was largely in debt, and embarrassed in his business and unable to pay his debts, and that for the purpose of avoiding a great sacrifice of his goods, and of applying the whole of the same in a just and equitable manner, he sold such goods to Miller for \$1500, and received from him two notes for \$400 each, payable in one and two years after date, and allowed the residue of the purchase money to be retained by Miller in payment of a debt of \$63 which Hart owed him, and to secure him for his liabilities as endorser or surety for the then late firm of Miller & Hart. And Hart and Miller also admit in their answer that the paper on which Miller was either endorser or surety for the firm of Miller & Hart was not taken up by Miller, and that the same remained unpaid. Miller knew, when he purchased the goods, that Hart had been prosecuted; and he undoubtedly also knew that he was then insolvent. And although he had, by the purchase of the goods, received the full amount of the note on which he was endorser or surety, such notes remained unpaid, and Hart continued liable thereon. From these facts, and from the fact that the goods were sold to Miller on a long credit, it seems to me that the inference must be deduced that the sale of the goods was made with the intent to hinder, delay and defraud creditors. The single fact of a sale of all Hart's goods on a credit of one and two years for the greatest portion of the purchase money, when he was irretrievably insolvent, and while suits against him by his creditors were pending, is quite conclusive as to the intent to hinder, delay and defraud his creditors. The sale of the goods in the store must be adjudged fraudulent and void. I think the allegations in the bill sufficient to put in issue the validity of this

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sale; and if the plaintiffs had not examined Miller as a witness, they could have reached, in this suit, the goods sold and delivered to him, or would have been entitled to a decree against him for their proceeds. But the plaintiffs, by examining Miller, as a witness, have precluded themselves from having any decree against him as to the part of the case to which he was examined. (*Bradley v. Root*, 5 *Paige*, 636, 637. 4 *Id.* 130. 2 *Edw. Ch. Rep.* 194.)

The assignment to Livingston is not fraudulent on its face. It devotes, unconditionally, the whole of the property assigned to the payment of the debts of the assignor. It contains no reservation or condition for his benefit. It contains no provision calculated to hinder or delay creditors. By the assignment the assignee was bound immediately to convert the property assigned into money, and apply the proceeds in payment of the debts, in the order directed in the assignment. A man in embarrassed or insolvent circumstances, is not precluded from making an assignment of his property, in trust for the payment of his creditors. His assignment is valid if it unconditionally and absolutely devotes the whole of the property assigned to the payment of his debts, if it be made without any intent to hinder, delay or defraud his creditors. And if the assignment is valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it. There was no necessary connection between the sale of the goods in the store, and the assignment. And I do not think the evidence authorizes the conclusion that Livingston, when he accepted the assignment, did so with the intent to hinder, delay or defraud the creditors of Hart. The provision of the revised statutes (2 *R. S.* 136, § 5) which requires the immediate delivery, and an actual and continued change of possession of goods and chattels sold, mortgaged or assigned, does not embrace choses in action. Undoubtedly the non-delivery of a chose in action at the time of its assignment is, at common law, a badge of fraud, but it is not conclusive evidence of fraud, and may be explained. The defendants, in their answer, I think, sufficiently explain why the assignee did not take actual and immediate possession of the household

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furniture embraced in the assignment. I have a right to infer from the evidence that Livingston, on receiving the assignment, did take actual possession of all the books, notes, and accounts of Hart, except of one of the notes given by Miller on the purchase of the goods in the store, and that he retained the possession of them until the 22d of October, when he appointed Hart his agent to collect the choses in action assigned. Although the appointment of Hart as such agent should be regarded with suspicion, I do not think it, alone, or in connection with the other facts in the cause, sufficient evidence of an original intent on the part of the assignor and assignee, or of either of them, to defraud creditors. A fraudulent intent, entertained subsequent to the execution and delivery of the assignment, will not invalidate it. The allegation in the bill is not sufficient to raise the question as to the effect of the appointment of an insolvent, as an assignee. The bill does not allege that Livingston was insolvent. It merely states that he is not responsible for \$10. To bring the case within that of *Reed v. Emery*, (8 *Paige*, 417,) the assignee must not only be insolvent, but he must be known to be so by the assignor, at the time of the execution of the assignment.

Upon a careful examination of the whole case, I have come to the conclusion that the assignment must be declared to be a valid assignment.

In *Brownell v. Curtis*, (10 *Paige*, 219,) the chancellor decided that where an insolvent debtor makes a fraudulent transfer of his property, he can not, by an assignment wholly voluntary on his part, take away the right of his creditors generally, to set aside such fraudulent transfer, and transfer that right to his own assignee, for the benefit of preferred creditors, or of all his creditors equally. According to this decision, the right of the creditors of Hart to set aside the fraudulent sale of his goods in the store, to Miller, was not taken away by his assignment to Livingston. If the plaintiffs had not examined Miller as a witness, they would have been entitled to a decree against him for the value of the goods delivered to him by Hart; and the result of such a decree would have been that he would

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have been relieved from the payment of the two notes of \$400 each, given by him to Hart in part payment of the price of the goods. One of these notes was delivered by Hart to Miller to secure him for liabilities assumed by the latter, on the compromise of two of Hart's New-York debts. The question now arises whether the plaintiffs are not entitled to a decree that the defendant Livingston deliver over to the receiver in this cause the remaining note of \$400 against Miller, still in the hands of Livingston; or that the decree of the vice chancellor, against Livingston, be affirmed, so far as it relates to this note. It seems to me that if the assignment to Livingston did not transfer to him the right of the creditors of Hart to set aside the sale of the goods to Miller, Livingston did not, as assignee, acquire any right to the note given by Miller for the price of the goods, the fruit of such fraudulent sale, as against the creditors of Hart. The creditors, in a suit against Miller to set aside the sale of the goods to him, could have elected to limit their remedy against him to the amount of the notes given by him in payment for the price of the goods, without affirming the validity of the sale; or in other words, they could have adopted the amount of the notes, as a liquidation in part, of the value of the goods sold, without an affirmance of the sale. Miller, as to the \$400 note in the hands of Livingston, has no beneficial interest in resisting a decree for its payment to the receiver, or rather for the payment to such receiver of a like sum, in lieu of such note, as in part for the value of the goods sold and delivered to him by Hart. For it will be immaterial to him whether he pays that sum to the receiver or to the assignee. The rule precluding a plaintiff from having a decree against a defendant whom he examines as a witness, does not extend to that part of the case to which he does not examine him, or as to which he has no beneficial interest in resisting a decree in favor of the plaintiff. (5 *Paige*, 636, 637. 1 *Barb. Ch. Pr.* 259. 2 *Edw. Ch. Rep.* 192.) The form of the decree of the vice chancellor creates no difficulty in modifying it so as to give the plaintiffs a remedy against Miller to an amount equal to the sum due on the note against him in the hands of the as-

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signee. For the court, on the appeal, can annul, affirm, modify or alter the decree of the vice chancellor, or make any other order in the cause, as justice may require. (2 R. S. 178, § 62.)

Whether Miller can hold the note delivered to him by Hart will be a question to be settled between him and the assignee, or the creditor, preferred in the assignment. If the property assigned is not sufficient to satisfy the debts of the creditors preferred in the assignment before those compromised by Miller, he may be liable to pay such creditors the amount of that note; especially if he received it from Hart with notice of their rights. (5 Wend. 20, 566. 12 Id. 484.)

All three of the defendants united in a joint appeal from the decree of the vice chancellor. Hart had no interest in the question as to the validity of the assignment. Whether the assignment is upheld or set aside, his property must alike be applied in payment of his debts. He was not injured by that part of the decree which set aside the assignment; and he could not, therefore, appeal from it. The residue of the decree, as to him, was correct, and must be affirmed. The decree, so far as it sets aside the assignment and charges Livingston with costs, and directs him to deliver over to the receiver all property of the defendant Hart, which came into his hands under the assignment, (except as to the note of \$400 given by the defendant Miller, now in his possession,) must be reversed. And the decree must be so modified as to declare that the sale of the goods in the store of Hart, by him to the defendant Miller, was and is fraudulent and void as against the plaintiffs. And the decree to be entered on this decision must direct that the defendant Livingston deliver up to the receiver such remaining note of \$400 given by Miller to Hart; and that the defendant Miller pay to such receiver, or to the plaintiffs, such amount of the value of the goods so delivered to him by the defendant Hart, on the sale aforesaid, as shall be equal to the amount due on the said note of \$400, and that on such payment being made, such note be delivered up to the said Miller; such sums so paid, to be applied on the debt of the plaintiffs against the defendant Hart. No costs in the suit before the vice chancellor should, under the

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circumstances, be allowed to Miller, although he was examined as a witness by the plaintiffs. The bill was properly filed against him, as to that part of the case in which he was interested, and the suit properly proceeded against him to obtain relief as to such part of the case. If he had not been examined as a witness he would have been liable to pay costs. Livingston is not entitled to costs in the suit before the vice chancellor, because the plaintiffs were entitled to relief against him as respected the note for \$400 in his hands, and because there were some circumstances of suspicion, growing out of his employment of Hart as his agent to collect the choses in action assigned, which probably induced the plaintiffs to file their bill to set aside the assignment. No costs can be allowed to either party on the appeal. Where there is a joint appeal by two or more defendants, and the decree is affirmed as to one and reversed as to the others, or where the decree is in any other respect affirmed in part and reversed in part, no costs are allowed to either party on the appeal. A decree must be entered in accordance with the principles of this decision and the above directions.

ONONDAGA GENERAL TERM, March, 1849. *Pratt, Gridley,*
and *Allen*, Justices.

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The delivery of a deed to the county clerk, for record, and for the use of the grantee, is a perfect delivery by the grantor; and upon an acceptance of such deed by the grantee, it takes effect from the time of such delivery.

Parol evidence will not be received for the purpose of engrafting upon a deed any condition, limitation, or reservation inconsistent with its terms.

Accordingly, *held* that a trust could not be established between the grantor and grantee in a deed absolute on its face, by evidence of a parol message sent to the grantee, by the grantor, *after* the delivery of the deed, informing him of such delivery and expressing a hope that the grantee would take the property and

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sell it to pay the grantor's debts, and that if there was any balance left, the grantee would let him have it in money, or lands in some other place; such message not being simultaneous with the delivery of the deed, and a part of the same transaction, and the messenger not being the agent of the grantor, and no assent or dissent on the part of the grantee to the terms and conditions mentioned being required.

The confessions and declarations of parties are always received with distrust, and should be closely scrutinized. *Per ALLEN, J.*

Under the statute of frauds parol evidence is inadmissible to establish a trust respecting real estate. And the doctrine of part performance will not be applied, and held to take such a trust out of the statute.

The acts of part performance which will estop a party from insisting upon the statute of frauds must be on the part of the person asking a performance, and not by the person insisting upon the statute.

To constitute a part performance of a parol agreement which will estop a party from insisting on the statute of frauds, the acts of such party must be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement of which they are a part execution. And they must be a part performance of the precise agreement set up.

The grantor in a deed containing covenants of warranty is estopped from claiming a resulting trust in the premises conveyed, for his own benefit. Even if he might so far explain his own deed as to show a non-payment of the purchase money, he can not, by parol evidence, do away with his covenants of warranty.

Where a deed contains an express declaration that the conveyance is for the use of the grantee, and it is made for a good and valuable consideration, there can be no implied or resulting use or trust in favor of the grantor.

IN EQUITY. This was an appeal from a decree of the late vice chancellor of the fifth circuit, dismissing the plaintiff's bill, but without costs to either party. The bill alleged that on the 16th of July, 1828, the plaintiff owned the undivided two thirds of a farm of about 300 acres in Warren, Herkimer county. That his father, the defendant, owned the other one third of the premises, the same having, on that day, been conveyed to him by the plaintiff in satisfaction of the bond of the plaintiff secured by a mortgage on the whole premises. That on the 19th of September, 1829, the plaintiff finding himself embarrassed, in order to facilitate the payment of his debts, assigned all his estate both real and personal to the defendant, in trust, to sell the same and from the proceeds of the sale to pay and satisfy all the debts the plaintiff was then owing, or had contracted, whether then due or not, and without giving a preference to any whose

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demands had become due as to time of payment, and others not due to be paid when due ; and that the defendant was to make immediate sales of the trust property, and pay up the debts as fast as reasonably could be done, and what trust property there should be remaining after paying all the debts of the plaintiff, and deducting all the costs and expenses of executing the trust, the defendant was to pay to the plaintiff in cash or in land. The bill further charged, that in order to vest the defendant with the title to the real estate, to enable him to execute the trust, the plaintiff and his wife executed a warranty deed of the premises to him for the consideration, as stated in the deed, of \$4000, and that the consideration was inserted as a matter of form, and was never in fact paid. That the defendant accepted the trust, and took possession of the real and personal property, and sold the real estate in parcels and received the pay therefor. That the personal property was worth \$1500, and that he paid debts of the plaintiff to the amount of about \$1500. The bill prayed an account, &c. and that the defendant might be decreed to pay to the plaintiff what should be found due him upon such accounting, &c.

The answer alleged that for some time previous to January 1, 1825, the defendant had been the owner, in fee simple, of the entire farm, and that upon the farm was a large and valuable personal property, consisting of farming utensils, horses, wagons, stock, &c. and that about that time he conveyed to his son, the plaintiff, who had a few months before arrived at the age of 21 years, the farm, which was actually and reasonably worth \$6500, and took from him a mortgage for \$2500, in payment of which he afterwards received a reconveyance of one third of the farm as stated in the bill, and that it was understood and agreed that the residue of the value of the farm, viz. \$4000, should be allowed and accounted for by the plaintiff as received of the defendant, on a final settlement of the affairs of the defendant, and in the division of his property among his children. That the plaintiff thereupon took possession of the farm and all the personal property upon it, but neglected the farm and suffered the fences and buildings to decay, cut and sold valuable

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timber, and became embarrassed by debts contracted by him. That on the 19th of Sept. 1829, he conveyed the two thirds of the premises, of which he still held the title, to the defendant, by deed containing the usual covenant of warranty. The defendant denied all trusts, or that there was any agreement, express or implied, that the lands were conveyed to, or were to be held by him in trust, for any purpose, or that he took such conveyance on any other terms than as payment for the \$4000 due him. The answer further alledged that about the 21st of September, 1829, the defendant was informed that the plaintiff had left Herkimer county, and did not intend to return; that he had left a large amount of debts unpaid, and that he desired the defendant to take his personal property and convert the same to the payment of his debts. That he thereupon went to his residence, and found that attachments to a large amount had been levied upon the plaintiff's property, and to an amount greater than the whole value of the property, and that he took the property and advanced the money and paid the debts of the plaintiff. It was proved, and conceded by the counsel, that the debts of the plaintiff, paid by the defendant, exceeded the value of the personal property of the plaintiff. The proofs showed that the farm had been conveyed by the defendant to the plaintiff at the time stated in the answer, and that the only consideration for the conveyance was the bond and mortgage of the plaintiff for a part of the value, and in satisfaction of which the one third was afterwards reconveyed to the defendant. The plaintiff proved by one witness (Ely) that he was with the plaintiff at the office of the clerk of Herkimer county in Sept. 1829, about the time he went away, and that the plaintiff told him to go and tell his father to take his property and sell it to pay his debts, and after taking out his trouble, if there was any balance, to let him have it in money or land in some other place; that this was on Saturday, and that he saw the defendant on Monday following, and the witness added, "I think I told Benjamin Rathbun the news. I think I told him there was a deed left for him in the clerk's office at Herkimer. I think I told him that Charles had executed the deed to him of his farm. I

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do not recollect of saying any thing to him about the personal property. The language of Charles (the plaintiff) was, to take his property, to dispose of it to the best advantage, and pay his debts." Soon after this the defendant took possession of the property. It was proved by another witness that Ely, about the time of the transaction, had given a different account of it. The plaintiff also attempted to establish the trust by declarations of his father made in 1841, in a conversation had between him and his father in the presence of a witness by the name of Webb. Other witnesses present at the same conversation gave a different version of it from Webb. Other evidence in the case was given as to the value and condition of the property and the payment of the debts of the plaintiff, by the defendant, and the disposal by the latter of the property.

J. Ruger, for the appellant.

H. Denio, for the respondent.

By the Court, ALLEN, J. The evidence relied upon to establish a trust in this case, if admissible at all, is very slight, and entirely insufficient for that purpose.

I. The transaction is susceptible of a very easy and satisfactory explanation without reference to a purchase of the premises by the defendant, or the creation of a trust for the benefit of the plaintiff of the character of that set up in the bill. The plaintiff had but a very short period before received the title to the property from the defendant, his father, by way of advancement, and after an experiment of some three or four years, found himself embarrassed to that extent that he deemed it necessary to abandon the property and his residence; and it was very natural, as it was highly proper, that he should reconvey so much of the property as he had not squandered, and of which he had proved himself so improvident a manager, to the defendant from whose bounty he had received it. The consideration was ample as between the parties to the deed, and of a character which commends itself to the favor of this court. The presumption

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that such was the character of the transaction (I speak now without reference to the testimony of Ely and Webb) is strengthened by the fact that without any interview with the defendant, and of his own volition, the plaintiff executed, acknowledged, and delivered to the clerk of Herkimer county for record, and for the use of his father, a deed of the premises, unconditional in its terms and without any condition annexed to its delivery. Its delivery to the clerk of the county for the use of the defendant was a perfect delivery by the plaintiff; and upon acceptance by the defendant the deed took effect from the time of such delivery. (*Elsey v. Metcalf*, 1 *Denio*, 323.)

II. The evidence of Ely, which is relied upon to rebut the presumption arising out of the relation of the parties and their situation and history in respect to the property in question, is liable to the remarks, (1.) That it is the statement of a conversation in which the precise words used, or at least words of the very same import, are very material to a right understanding of the case made over twelve years after the conversation took place; and it would be wonderful indeed if the witness has recollected the language used upon that occasion, so that he can convey at this time the same idea which the parties then designed to convey by their language. And if his testimony was positive, full, direct and certain, a court should hesitate long, even if no statutory provision stood in the way, before giving effect to it, in opposition to the plain tenor of the deed of the party, and which has been acquiesced in for twelve years. It would not be discreet to make a decree upon evidence of this unsatisfactory character. (2.) The message delivered to him for the defendant was *after* the deed had been delivered to the clerk for the defendant. It was not simultaneous with such delivery, and a part of the same transaction: neither was the witness constituted the agent of the plaintiff, for any purpose. The assent or dissent of the father to any suggestions or conditions of the plaintiff were not to be communicated to the latter, and were not to affect the validity of the deed or the conduct of the plaintiff, tending most strongly to show that the conveyance to the defendant was a mere return of the bounty the plaintiff had be-

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fore received from his father. (3.) The message now said by the witness to have been delivered to him by the plaintiff, for the defendant, was not to the effect that the property had been conveyed to the latter upon any trust, or upon any conditions, but was merely a notice of the fact that a conveyance had been executed and delivered, leaving the conveyance to speak for itself, and a request in the nature of an appeal to the future bounty of the father, to let him have what, if any thing, should be left after the payment of the debts, in such form as the defendant should see fit—no provision or condition that in any event any part of the specific property should be reconveyed to the grantor. The conveyance was intended to be, as it was, absolute. (4.) There is no evidence that that part of the message relating to the payment to the plaintiff of the avails of any part of the property was ever delivered to the defendant. The witness says he told the defendant the “news,” that is, that his son had conveyed the property to him, the defendant, and had absconded. (5.) The credit to be given to the testimony of this witness is greatly diminished by the evidence of Belknap, showing that soon after the transaction, and when we may suppose his recollection was distinct, he gave an entirely different version of the affair, and one entirely inconsistent with the creation or existence of a trust. It is true the evidence of Belknap does not establish, or tend to establish, the true character of the transaction; but it does establish the fact that the testimony of Ely can not safely be relied upon at this time to effect the transfer of a valuable property from the defendant to the plaintiff. (6.) The evidence of Webb, relied upon to corroborate and confirm the present recollection of Ely, is unworthy of consideration. The interview with the defendant to which he was called to testify was got up and arranged eleven years after the principal transaction, with a view to draw from the old gentleman, the defendant, who was unsuspecting of the design, a confession, or some declaration, or some assent express or implied to some fact which might be construed into an admission of the existence of some trust; and was doubtless managed in a manner calculated to bring about the desired result. And it would have been

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wonderful indeed if they had not found something which they were willing to construe into an admission of the claim of the plaintiff. The confessions and declarations of parties are always received with distrust, and should be closely scrutinized; but when got up as these were, from an unsuspecting old man somewhat deaf, and drawn out by a designing son and noted by a willing if not an anxious witness, they should have no influence at all in a doubtful case; and it is only in *very* doubtful cases that they would be resorted to. The acts of the old gentleman upon the occasion give the lie to every presumption sought to be drawn from his declarations that he then supposed that the relation of trustee and cestui que trust existed between him and his son in respect to the property in question; for he distinctly refused to acknowledge any claim on the part of the son. The conduct and manner of the witness while under examination, and the pertinacity with which he refused to speak of the interview except from his memorandum, tend still further to detract from the credit to be given to his testimony. The other witnesses present at the same interview give a different version of the conversation and declarations of the parties, and I must say apparently somewhat more natural. The conversation, as related by Webb, is certainly very formal, forced and unnatural, and I may add improbable.

III. But if the plaintiff has succeeded in establishing every fact which he claims to have established by the evidence of Ely and Webb, still he has failed to entitle himself to a decree in his favor. (1.) The evidence is incompetent to engraft upon the deed any condition, limitation, or reservation inconsistent with its terms. (*Webb v. Rice*, 1 *Hill*, 606; *S. C. in error*, 6 *Id.* 219. *Swick v. Sears*, 1 *Id.* 17.) (2.) Parol evidence was inadmissible to establish a trust. It is provided by 1 *R. L.* 79, § 12, "That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is or shall be by law entitled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." (a)

(a) See also 2 *R. S.* 137, § 2.

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It is not necessary that the writing by which the trust is manifest should be made at the time the trust is created. It is sufficient if it is evidenced by a writing made by the proper party at any time. (*Story's Eq. Jur.* § 972. *Steere v. Steere*, 5 *John. Ch. Rep.* 1. *Forster v. Hale*, 3 *Vesey*, 696. *Leman v. Whitely*, 4 *Russ.* 423. *Jackson v. Moore*, 6 *Cowen*, 706.)

IV. But it is insisted that this case is taken out of the statute, by a part performance of the trust by the defendant. There are several difficulties in this part of the plaintiff's case. (1.) I find no case in which the doctrine of part performance has been applied and held to take the case of a trust of real estate out of the statute; and courts have not recently been astute to discover reasons to evade the statute of frauds, and have been unwilling to extend the doctrine of part performance to new cases. (6 *Paige*, 293. *Story's Eq. Jur.* §§ 765, 766. 3 *Vesey*, 712, 713.) (2.) The doctrine of part performance is based upon the principle that it would be inequitable, and a fraud on the part of the individual insisting upon the statute, to rely upon it after having, by his acts, induced his adversary to do acts in part performance of a parol agreement and upon the faith of its full performance by both parties, and for which he cannot well be compensated in any manner except by a specific performance of the agreement; and hence the acts of part performance which are (not to take the case out of the statute but) to estop a party from insisting upon it, must be on the part of the person asking a performance, and not of the person insisting upon the statute. For if the latter chooses to waive the benefit of his acts of part performance, his adversary has no claim for relief founded upon it; and here all the acts of part performance relied upon are the acts of the defendant. (7 *Vesey*, 341. *Roberts on Frauds*, 138. *Story's Eq. Jur.* §§ 759, 761.) (3.) The acts of the defendant, in the payment of the debts, are not necessarily referable to the existence of a trust. Two considerations may have operated to induce him to pay the debts of his son. His relation to the plaintiff might well induce him to pay the debts, and thus save his son from reproach. The consideration for the transfer of the property, although sufficient

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to support the transaction, as between the parties, might have been invalid as against the creditors of the grantor; and the payment of the debts may be considered as a part payment of the purchase money. And acts to be deemed a part performance of a parol agreement, so as to estop a party from insisting upon the statute of frauds, should be so clear, certain, and definite in their object and design as to refer exclusively to a complete and perfect agreement of which they are a part execution. (*Story's Eq. Jur.* § 762.) And they must be a part performance of the precise agreement set up. (*Phillips v. Thompson*, 1 *John. Ch. Rep.* 131. *Parkhurst v. Van Cortlandt*, *Id.* 273. *German v. Machin*, 6 *Paige*, 293.)

V. The plaintiff is not entitled to a decree declaring an implied or resulting trust in his favor in the property transferred, or the proceeds thereof. (1.) Such a decree would be entirely inconsistent with the case made by his bill. It would have to proceed upon the assumption that there had been a sale of the property to the defendant, and that no part of the purchase money had been paid; or that the property had been transferred without consideration and upon trusts which had wholly failed. Either of which positions would directly contradict the entire case made by the bill. A resulting trust for the benefit of the plaintiff is quite another and a different thing from an express trust for the payment of debts; and under an allegation of one, the other can not be established. (1 *Hoff. Ch. Rep.* 49, *and note.*) (2.) The plaintiff is estopped by his deed with covenant warranty from claiming a resulting trust in the premises for his own benefit. Even if he might so far explain his own deed as to show a nonpayment of the purchase money, he can not, by parol evidence, do away with his covenants of warranty. (*Squire v. Harder*, 1 *Paige*, 494. *Moran v. Hays*, 1 *John. Ch. Rep.* 339.) (3.) There is an express declaration in the deed that the conveyance is for the use of the grantee, and the conveyance was for a good and valuable consideration; and in such a case there can be no implied or resulting use or trust. (*Story's Eq. Jur.* §§ 1197, 1199.) The case of *Leman v. Whitley*, (4 *Russ. Rep.* 422,) is cited and relied upon by the plaintiff

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to sustain a claim of a lien for the consideration stated in the deed as for so much purchase money. This case is said by Judge Story to stand upon the utmost limits of the doctrine of the inadmissibility of parol evidence as to resulting trusts. (*Story's Eq. Jur.* 1199, note 2.) But there is a manifest distinction between the two cases. That was the case of a naked conveyance to the father, without consideration, and for a particular purpose, which entirely failed by the death of the father; and it was not intended to vest in the father a beneficial interest for any purpose. And if he or those claiming under him should hold under the deed, there was great equity in compelling them to pay the purchase money. But in this case the facts are entirely different, and the claim for the purchase money can not be allowed without directly establishing the trust, which is not evidenced by writing. Again; the bill is not framed with a view to such relief, and it does not at this time require the citation of authorities to the principle that relief can only be granted according to the case made by the bill, as well as by the evidence. The other cases relied upon by the plaintiff were cases of sale, and not of trust. (*Hess v. Fox*, 10 *Wend.* 436. *Shepherd v. Little*, 14 *John. Rep.* 218.) The claim for an account of the personal property is barred; 1. By the statute of limitations, and 2. By the evidence, as well as the concessions of the counsel upon the argument, that the payment by the defendant for the plaintiff exceeded the value of all the personal property received by him. The decree of the vice chancellor is affirmed, with costs.

SAME TERM. *C. Gray, Pratt, Gridley, and Allen, Justices.*

STARING *vs.* BOWEN.

Where a party moves for a new trial, upon a bill of exceptions, he must rely upon the grounds taken and the points made by him, upon the trial, and upon those only. ✓

The certificate of a surrogate, of the proving of a will before him by one of the subscribing witnesses, is not proof of the execution of the will, so as to authorize the will to be given in evidence.

To entitle a will to be read in evidence as an ancient will, without proof, the possession must have been in accordance with the will for thirty years.

• Mere efflux of time will not authorize a will of thirty years standing to be given in evidence without proof. There must have been possession under it.

Where there are no circumstances shown to establish the genuineness of a will, and the evidence is that the premises have been occupied by some one from the death of the testator; but the plaintiff is unable to show that such possession was in pursuance of the provisions of the will, for the period of thirty years; and there is better evidence of the execution of the will, within reach of the plaintiff, viz. one of the subscribing witnesses residing within the state, such will can not be received in evidence as an ancient deed, without proof.

Where possession is relied upon, instead of the ordinary and usual proof of the execution of a will, it is not sufficient to exclude it that one of the witnesses to the will is still living.

But the possession which will excuse the production of the subscribing witnesses to a will, must be for the full term of thirty years, since the death of the testator, if not to the time of the commencement of the action.

Although a will of more than thirty years standing may, in the discretion of the judge, be permitted to be read as an ancient will, before proof of an accompanying possession, still it is a question as to the order of proof, in the discretion of the court, whether the possession shall be first proved or the will first given in evidence, in order that the court may be able to say whether the possession has been in accordance with the provisions of the will.

THIS was an action of ejectment, tried at the Oneida circuit on the 26th day of September, 1845, before his Honor PHILLO GRIDLEY, Circuit Judge. The declaration contained two counts, in each of which the plaintiff claimed in fee an equal undivided fourth part of the easterly part of lot No. 60, in Gage's Patent, situate in the town of Deerfield, in the county of Oneida, and containing one hundred acres, &c. The plea was the general issue, and upon the trial the defendant's counsel admitted

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and offered them as evidence, to wit. an agreement between Frederick A. Staring, Philip A. Staring and John Staring, dated May 18th, 1817. Also an agreement under seal between Nelly Staring, Frederick A. Staring and Philip A. Staring, dated June 24th, 1817. The defendant's counsel objected to the will being given in evidence as an ancient will, without proving its due execution, and also to the agreement and other evidence so offered being sufficient to authorize it to be so read as to enable the plaintiff to recover. His honor, the circuit judge, thereupon decided the evidence offered was inadmissible, and rejected the said will and agreement so offered as evidence, on the ground that there appeared to be a living witness to the will, within the jurisdiction of the court, and that from the death of Nelly Staring, the widow, in 1840, back to the death of the testator, was less than forty years, and there was no evidence, (though an attempt had been allowed and made to prove the fact,) of the defendant's occupation or claim under the will, though it was admitted he had been in possession several years. To which decisions and rejections the plaintiff's counsel excepted. And no further evidence being offered the circuit judge directed the clerk to enter a nonsuit, which was done accordingly. And to this direction the plaintiff's counsel also excepted; and upon a bill of exceptions the plaintiff now moved for a new trial.

D. P. Corey, for the plaintiff.

L. Ford, for the defendant.

By the Court, ALLEN, J. The plaintiff moves for a new trial upon a bill of exceptions, and must rely upon the grounds taken and the points made by him upon the trial. He there claimed expressly as devisee under a will of his father, and put forth no other ground of claim whatever. He can not, therefore, be permitted, upon this occasion, to insist that he was wrongfully nonsuited, for the reason that the evidence showed a seisin in his ancestor, and that he was entitled to recover as heir, if no will was proved. In his declaration he claimed one

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undivided fourth part of the premises ; which would have been his interest if he had succeeded in establishing his claim under the will ; whereas, in the capacity of heir, his interest would have been one-eighth. And in the bill of exceptions made by himself, he has stated that he claimed title under the will. He must be confined to that claim. (*Cowen & Hill's Notes*, 791, and cases cited.) There appears to have been no question made upon the trial as to the title of the plaintiff's ancestor ; and the only question was whether the will was sufficiently proved to admit it to be read in evidence.

It was first offered in evidence as proved before the surrogate of the county of Montgomery, on the 16th of June, 1814, by the oath of Luther Pardee, one of the subscribing witnesses, no account being given of the other witnesses ; the proof being evidenced by the certificate of the surrogate. And an exception was taken to the decision of the circuit judge excluding the will as evidence under that proof. This exception is not now relied upon. The proof came far short of any statutory requirement upon that subject ; and the certificate of the surrogate was not evidence, either by statute or the common law. (*Jackson v. Laraway*, 3 *John. Cases*, 283. 1 *R. L.* 365, § 6. 1 *K. & R.* 178, § 6.)

It was proved, upon the trial, that one of the subscribing witnesses was living within the jurisdiction of the court, and the plaintiff then proposed to read the will in evidence as an ancient will, without proof of its execution ; and in connection with such proposition gave in evidence two agreements relating to the occupation of the premises ; the one between the widow of the testator, who had, under the will, a life estate therein, and who died in 1840, and Frederick A., and Philip A. Staring, two of the sons of the testator, and another agreement between Frederick A., and Philip A., and John Staring, by which the latter agreed to convey to the former his interest in the premises. The plaintiff attempted, but unsuccessfully, to show that the defendant had occupied in continuation of the same title and under the will. The defendant had been in possession, at the time of the trial, for some eight or ten years, and the testator died in 1812.

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The circuit judge rejected the will and agreements "on the ground that there appeared to be a living witness to the will within the jurisdiction of the court, and that from the death of Nelly, the widow, in 1840, back to the death of the testator, was less than forty years; and there was no evidence, (though an attempt had been allowed and made,) to prove the fact of the defendant's occupation or claim under the will, though it was admitted he had been in possession several years."

A point is now made that the agreements before referred to were improperly rejected, for the reason that they tended to characterize the possession of the premises, for a part of the time, after the death of the testator, and show it in harmony with the provisions of the will. I do not understand that the agreements were rejected as evidence, but that the circuit judge merely held that they were not alone sufficient to authorize the reading of the will in evidence. That they only showed possession under the will from 1817 to 1840, less than thirty years, and terminating several years before the trial. Such was clearly the effect and extent of the decision. In this view the decision was clearly correct.

There is doubtless a clerical error in making up the bill of exceptions, in relation to the number of years which the possession must have followed the will to entitle it to be read in evidence as an ancient will, without proof. Thirty years is the time as now settled; but whether thirty, or forty, as stated in the bill of exceptions, is immaterial in this case, as the plaintiff failed to show possession in accordance with the will for either period. Mere efflux of time will not authorize a will of thirty years standing to be given in evidence without proof. There must have been possession under it. (1 *Phil. Ev.* 504. *Jackson v. Luquere*, 5 *Cowen's Rep.* 221. *Rancliff v. Parker*, 6 *Dow* 202, *per* *Ld. Eldon*.)

There are cases, it is true, in which other circumstances tending to show the genuineness of the instrument have been allowed to supply the want of proof of a continued occupation under the will for thirty years, where the premises have been a part of the time wild and uncultivated, and the party has given

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the best evidence of the execution of the will of which the case was susceptible. (*Jackson v. Luquere*, 5 Cowen, 221. *Jackson v. Laraway*, 3 John. Cases, 283.)

In this case, however, there were no circumstances shown to establish the genuineness of the will, and the evidence was that the premises had been occupied by some one from the death of the testator; and the plaintiff was unable, although permitted to make the effort, to show such possession in pursuance of the provisions of the will, for a period of thirty years. And there was better evidence of the execution of the will within reach of the plaintiff, namely, one of the subscribing witnesses thereto, residing within the state. Where possession is relied upon instead of the ordinary and usual proof of the execution of a will, it is not sufficient to exclude it that one of the witnesses to the will is still living. (*Doe v. Wolley*, 8 Barn. & Cress. 22. *S. C.* 3 C. & P. 402, and 2 Man. & Ryl. 195.) But the possession which will excuse the production of witnesses to the will, must be for the full term of thirty years, if not to the time of the commencement of the action; and the thirty years with us commences at the death of the testator, and not, as in England, from the date of the will. (*Doe v. Wolley*, *supra*; *per Kent*, in *Jackson v. Laraway*, and cases cited by him. *Fetherly v. Waggoner*, 11 Wend. 599. *Jackson v. Christman*, 4 Id. 277. *Jackson v. Van Dusen*, 5 John. R. 144. *Jackson v. Blanshan*, 3 Id. 292.) Although a will of more than thirty years standing may, in the discretion of the judge, be permitted to be read as an ancient will, before proof of an accompanying possession, still it is a question as to the order of proof, in the discretion of the court, whether the possession shall be first proved, or the will first given in evidence, in order that the court may be able to say whether the possession has been in accordance with the provisions of the will. (*Doe v. Passingham*, 2 C. & P. 440. *Cowen & Hill's Notes*, 718.) In this case the proof was all before the court at the time of making the decision, and the will was properly excluded. A new trial is denied.

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SAME TERM. *Before the same Justices.*

PAUL KELLOGG and others vs. JAMES KELLOGG.

To recover in ejectment, under a purchase of the premises at a sheriff's sale on a judgment against the defendant, it is sufficient for the plaintiff to show the defendant in possession at the time of the recovery of the judgment against him, and a continued possession in him from that time to the time of the commencement of the suit, and that the plaintiff acquired the title of the defendant, under the sheriff's sale.

Under a naked contract of purchase, which is silent on the subject of possession, the purchaser acquires no right to the possession, and no right of entry will follow from it.

If the purchaser, in such a case, enters in pursuance of a parol license from the vendor, the possession thus acquired is an interest in the land distinct from the interest acquired under the contract, and is subject to sale on an execution.

Where a person has taken from another a contract for the purchase of land, and has treated him as the owner, he will not be permitted, in an action of ejectment, brought by the vendor, to set up his possession as adverse to the title of his vendor; but his possession will be deemed consistent with the title of his vendor.

Where a contract for the sale of land does not give to the purchaser any right of entry, but he is in possession of the premises, at the time of bringing an ejectment against him, his possession will not be assumed to be under his contract for the purchase, but will be referred to some other right or contract.

Although, for some purposes, the entry of a purchaser upon the purchased premises is called an entry as by a tenant at will, yet the estate of the vendee can not be said to be an estate at will, or at sufferance. *Per ALLEN, J.*

The possession of a vendee in possession under a contract of purchase may be likened to that of a tenant, for many purposes, yet his estate is *sui generis*, and does not come within the act exempting estates at will or by sufferance from sale on execution.

A copy of an answer in chancery, served on the plaintiff's solicitor as such, can not be given in evidence in a subsequent suit between the same parties, upon a witness testifying that he has compared only a portion of said copy with the original on file, leaving the remainder not compared.

As a copy of the answer on file, such copy is to be proved in the same manner as other transcripts, viz. by a witness who has compared the copy, line for line, with the original, or who has examined the copy while another person read the original.

Counsel will be excused from producing deeds in their possession and which they have received in their character as counsel; and from testifying as to their contents.

Where, in ejectment, the plaintiff proves title to a smaller quantity of land than

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he has claimed in his declaration, he is entitled to recover according to the proof; and the declaration may be amended accordingly.

In ejectment for lands held in common, it is not necessary that all the tenants in common should unite in the action; except when it is brought as a substitute for a writ of right.

It rests in the sound discretion of the judge, at the trial of a cause, to admit further evidence, or not, after the trial has once closed.

THIS was an action of ejectment, tried at the Oneida circuit in July, 1848, before Justice GRIDLEY. The declaration contained three counts. In the first count the premises were claimed as belonging to the plaintiff Pearl Kellogg, in fee. In the 2d count the plaintiffs Lester Barker, Rufus Mills and Alonzo Bradner claimed an undivided seven-elevenths and two-thirds of one-eleventh part of the premises, in fee. And in the 3d count the plaintiff Pearl Kellogg claimed an undivided two-elevenths of the premises described, in fee. The plea was the general issue. On the trial, the plaintiffs gave in evidence (1.) The record of a judgment in the supreme court in favor of Charles P. Kirkland and others against James Kellogg (the defendant) for \$500 of debt and \$7 of damages and costs, docketed August 28, 1841. (2.) The docketing of said judgment in the office of the clerk of Oneida county on the 1st day of September, 1841. (3.) An execution on said judgment, issued to the sheriff of Oneida, tested July 31, 1843, and returnable in sixty days, with the sheriff's endorsement thereon that the same was satisfied. (4.) The sheriff's certificate of sale (by virtue of said execution) of the premises in question to Charles P. Kirkland, dated January 30, 1844. (5.) The assignment of said certificate by Charles P. Kirkland to the plaintiff Pearl Kellogg, dated February 17, 1845, duly acknowledged and filed in the clerk's office of Oneida county, on the 8th day of Sept. 1845. (6.) A deed of the premises in question by the sheriff of Oneida to said Pearl Kellogg, dated May 1, 1845, and also another deed by the sheriff to said Pearl, dated Sept. 9, 1845, the first of which said deeds was recorded on the 2d day of May, 1845, and the other was recorded on the 11th day of November, 1845. It was here admitted that the premises sold were the premises

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in controversy, and constituted the homestead of Solomon Kellogg deceased, willed to his wife for life and by her occupied many years. Aaron Kellogg testified that he was a brother of the defendant and the plaintiff Pearl Kellogg; that he knew the premises; the defendant resided on them near Clinton; that he resided there in 1843 and 1844, occupying the farm, and did before that time for some years, and also in 1845, 1846, &c. The plaintiffs here rested.

The defendant then gave in evidence a contract between the said Pearl Kellogg and the defendant in the words and figures following: "This agreement, made the 8th day of May, 1837, between Pearl Kellogg of the first part, and James Kellogg of the second part, witnesseth, that for and in consideration of the covenants and stipulations hereinafter contained to be done and performed by the said party of the second part, said party of the first part agrees to deed the said party of the second part the lot of land this day by him bought of Ruth Kellogg and on which she has heretofore lived, being situated in the town of Kirkland in the county of Oneida, and containing about 62 acres of land, which was bequeathed to her by her husband, Solomon Kellogg, A. D. 1795. Said party of the second part covenants to support Ruth Kellogg where she may choose to reside, and to provide her with every thing necessary and proper for her comfortable maintenance during her life; that he will furnish her with bed and board, food and raiment such as will make her condition comfortable and her life agreeable; that during her illness he will furnish her with proper medical aid, and that during her inability, either from the infirmities of age or the effects of sickness, he will provide her with suitable help and attendance, and that he will pay all her reasonable expenses; and that in case she shall choose to lodge and eat by herself, and have a room of commodious size and situation for herself, he will see to it that her wishes are complied with in that behalf, and that during her life he will provide for and maintain her comfortably. Said party of the first part covenants to give a good and sufficient deed of the premises aforesaid after the decease of the said Ruth Kellogg, whenever the same shall be required of him, in case

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the said party of the second part shall have faithfully performed the stipulations of this contract, and have during the life of the said Ruth supported her in manner aforesaid; and in case of his neglect to support her in manner aforesaid, this contract to be null and void. In witness," &c.

The defendant's counsel then insisted, that being in possession under the said written contract, his interest could not be sold on execution, and therefore no interest or title was acquired under the said sheriff's sale and deed. To this it was objected by the plaintiffs' counsel, that it did not appear that the defendant was in possession under the contract, and that the contract did not authorize an entry or possession under it, and so the court ruled. And thereupon, for the purpose of proving that the said defendant was in possession under the said written contract, the defendant's counsel offered to prove that fact by the answer of Pearl Kellogg to a bill filed by James Kellogg in the late court of chancery, before the vice chancellor of the fifth circuit, which answer he proposed to prove by giving in evidence a paper which had been served on the solicitor of James Kellogg as a copy, and that the solicitor had compared the same with the answer on file so far as he thought the subject matter rendered it material, leaving however some forty folios of the answer which he did not compare. This evidence was objected to by the plaintiff's counsel, (1.) On the ground that the said answer in chancery was not so proved as to be admissible in evidence; the answer offered being the copy served in said chancery suit by the said Pearl's solicitor on the said defendant's solicitor, and the solicitor for said James testifying that he had compared about forty folios of said copy with the original on file, and that about forty folios of it had not been compared, and he could not swear that it was a copy. (2.) On the ground that said evidence so offered was in itself irrelevant and incompetent, for the reason that the written contract not giving any right of entry or possession, the sale on execution could not have been of any interest under said contract. The evidence was rejected, on both grounds, and the defendant's counsel excepted. The defendant's counsel then insisted that the interest of James Kel-

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logg which was sold on execution was that of a tenant at will, or by sufferance, and therefore not capable of being so sold, and offered to prove that Pearl Kellogg had regarded and treated James Kellogg as a tenant at will and by sufferance in and by his said answer, and relied on his offer of the said answer in evidence to show such fact; which, on being objected to, was rejected for the reasons aforesaid; the judge holding the evidence offered of the said answer as before mentioned inadmissible, and that it did not appear that the interest of the said James Kellogg was that of a tenant by sufferance or at will only, to which decision the counsel for the defendant excepted. The defendant then offered to prove that since the execution and delivery of the said sheriff's deed, and before the commencement of this suit, the plaintiff Pearl Kellogg had conveyed two-elevenths of the premises to the other plaintiffs. To the admission of this evidence the counsel for the plaintiffs objected, but the said justice admitted the evidence, and the counsel for the plaintiffs excepted. The defendant then proved that he had duly served notice to produce all and every deed or deeds, releases, conveyances or other instruments conveying or in any manner making over or securing from the said plaintiff Pearl Kellogg to the other plaintiffs the premises in controversy, or any part thereof; and no such paper or papers being produced, he called as a witness one of the plaintiffs, Lester Barker, who being sworn, testified that the plaintiff Pearl Kellogg never conveyed to him, in any way, his interest, or any part of his interest, in the premises in controversy. That said Pearl Kellogg was reputed to own two-elevenths of the premises. That the witness never received any deed of the premises, or any part thereof, from Pearl Kellogg, and did not know that he ever made any such deed to the witness and the other plaintiffs. That there were eleven shares, and Abraham and Aaron Kellogg were supposed to have a right in the premises, and the witness, with the plaintiffs Bradner and Mills, bought several of those shares of them, and Pearl Kellogg quit-claimed or released his interest in those shares; that they also bought of others who were supposed to have an interest, in all five-elevenths and two-thirds of one-eleventh, and Pearl Kel-

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loggy gave them releases of all his interest in those shares of the persons of whom they purchased. The whole of the shares so released was seven-elevenths and two-thirds of one-eleventh. That witness did not know that he had any of those releases or quit-claims in his possession ; that he had seen them, and had them, or part of them ; that Mr. Kirkland, his counsel, might have them ; witness delivered them, or a part of them to him. And thereupon the counsel for the defendant called upon the said counsel of the plaintiffs to produce the same, and charged that the same, or some of them, were in his possession, and then in court. He then proceeded to examine C. P. Kirkland, the counsel for the plaintiffs, (who had already been sworn as a witness,) in reference to the possession of said papers and the contents of them, but the said counsel stated that he could not say that he had any such papers as the said Barker described, and that he had not any releases or quit-claims in his possession or under his control, except such as he had received in his capacity as counsel for the plaintiffs, and thereupon he declined stating the contents, or producing the same. And the said justice decided that he could rely upon his privilege as counsel, and was not bound to produce them, nor to divulge their contents, if the same were received by him as a confidential communication ; and the counsel for the defendant excepted. Thereupon the said witness Lester Barker being further examined by the defendant's counsel, testified that in 1845 he bought two-elevenths of the premises of Aaron and Abraham Kellogg, who were supposed to have an interest, and took a deed thereof from them to himself and the other plaintiffs, Bradner and Mills ; that Pearl Kellogg, at the same time, gave them a release or quit-claim of all his interest in the two-elevenths which Abraham and Aaron conveyed to them ; that it was the agreement that he should do so, and witness supposed he did ; he knew it was a quit-claim of all his interest in two-elevenths of the premises, and he thought it said the two-elevenths which Abraham and Aaron had deeded to them. At a later date during the same season, the witness and Bradner and Mills bought two-elevenths more of Harvey Kellogg, another brother, being his own share and the share of his

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brother Green Kellogg, for his interest in these two-elevenths; Pearl Kellogg at the same time giving them a release or quit-claim similar to the former one. During the same season the witness and Bradner and Mills also bought one-eleventh which was owned by the heirs of Henry Kellogg deceased, another brother, and the interest which was owned by one of the heirs of Silas Kellogg deceased, another brother, and for these shares Pearl Kellogg also gave them releases or quit-claims similar to the former ones. In all he released his interest in seven-elevenths and two-thirds of one-eleventh of the said premises. During that season the witness and Bradner and Mills bought seven-elevenths and two-thirds of one-eleventh of the premises, but the witness did not recollect that Pearl Kellogg gave them any releases or quit-claims, except those conveying his interest in the said seven-elevenths and two-thirds of one-eleventh; he thought the names of the persons of whom they bought were mentioned in these respective quit-claims. On his cross-examination the witness testified that Pearl Kellogg never, to his knowledge, in any manner, sold or agreed to sell to him any other part of the premises, except as before mentioned. Whereupon the counsel for the defendant insisted that the plaintiff Pearl Kellogg having sold to the other plaintiffs some part of his interest in the premises was not entitled to recover any thing under the first count of his declaration, and only two equal undivided eleventh parts under the third count. He also insisted that the pleadings and evidence showing that a part of the premises in controversy belonged to some person other than the plaintiffs, a part only of the several tenants in common having brought the action, they should be nonsuited, or could not recover. And thereupon the defendant rested, and the judge suggested to the counsel to take a general verdict subject to the opinion of the court on the several questions of law arising in the case, which was agreed to by the counsel. The counsel for the defendant then recalled the witness Lester Barker to the stand, and offered to prove the ownership of the premises in controversy by one Solomon Kellogg, the ancestor of the plaintiff Pearl Kellogg and of the defendant, his will and his heirs, with the view

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of showing title out of the plaintiffs; it being conceded, or appearing, that said Solomon Kellogg died long before the sheriff's sale hereinbefore mentioned. The counsel for the plaintiffs objected to the admission of this evidence, on the ground (1) That the offer was made too late; (2) That the testimony itself was irrelevant and incompetent, for the reason that it related to matters that occurred long before said sheriff's sale; and the said justice rejected the evidence on both grounds, and the counsel for the defendant excepted.

A general verdict was then taken for the plaintiffs, subject to the opinion of the court on a case to be made, with power to the court to modify the verdict and apply it to one or more counts, or give judgment for the defendant, or grant a new trial, as might by them be deemed right; with liberty to either party to turn the same into a bill of exceptions or special verdict, to correct any errors of law that might be committed.

C. P. Kirkland, for the plaintiffs. I. The testimony offered, to show that the defendant was in possession under the contract, was properly rejected. (1.) The copy of the answer was wholly inadmissible. (*Belden v. Davis*, 2 *Hall*, 433. 1 *Phil. Ev.* 386, (*C. & H. ed.*) *Cowen & Hill's Notes*, 719.) (2.) The evidence itself was incompetent. (1 *R. S.* 736, 745, §§ 4, 5, 6. 2 *Id.* 598, 599. 9 *John. Rep.* 35. *Talbot v. Chamberlain*, 3 *Paige*, 220. 6 *Hill*, 525.) II. The testimony as to the defendant being tenant at will or by sufferance was properly rejected. (*Vide above authorities.*) III. The ruling of the judge as to the privilege of counsel was correct. (1 *Phil. Ev.* 140, 141, 142. 1 *Cowen & Hill's Notes*, 275, 276, 277.) IV. It is not necessary that all the tenants in common should join in an action of ejectment; except when it is a substitute for a writ of right. (2 *R. S.* 341, § 11. *Cole v. Irvine*, 6 *Hill*, 638. *Vrooman v. Weed*, 2 *Barb. Sup. C. Rep.* 330.) This objection, if it exist, should have been taken advantage of by demurrer. (2 *Wend.* 158.) V. But here all did join. VI. The judge properly rejected the evidence as to the ownership, will, &c. of old Solomon Kellogg. (1.) It was a matter of discretion at

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that stage of the cause whether to admit or reject the evidence. *Leland v. Bennett*, 5 *Hill*, 286.) (2.) The evidence was in itself incompetent and immaterial. (4 *Coven*, 599. 9 *Id.* 81, 233. 6 *Hill*, 525. 9 *Wend.* 223. 3 *Paige*, 220.) VII. A plaintiff in ejectment may recover for less than he declares for; for less land or for a less amount of interest in the land. (*Vrooman v. Weed*, 2 *Barb. Sup. Ct. Rep.* 330, 156, 644. *See also* 25 *Wend.* 434.) VIII. If the evidence of Barker is incompetent to show conveyances by Pearl Kellogg, then the whole title, quoad the defendant, is in Pearl, and he is entitled to judgment on the first count. IX. If the evidence of Barker shows conveyances by Pearl Kellogg, then it shows the title to seven-elevenths and two-thirds of one-eleventh vested in his co-plaintiffs Barker, Mills and Bradner; and the title to the remainder, viz. two-elevenths and one-third of one-eleventh remains and is in Pearl Kellogg; and then, according to the stipulation in the case, Pearl is entitled to judgment for two-elevenths and one-third of one-eleventh under the first count, and the other plaintiffs are entitled to judgment for seven-elevenths and two-thirds of one-eleventh under the second count. And thus, judgment is rendered against the defendant for the whole of the premises, and so it should be.

O. S. Williams, for the defendants. I. The title proved by the plaintiff was not good, because James Kellogg was in possession, under the contract, and therefore he had no interest which could be sold by execution at law. (1 *R. S.* 736, §§ 4, 6. *Griffin v. Spencer*, 6 *Hill*, 525. *Talbot v. Chamberlain*, 3 *Paige*, 219.) (1.) The defendant being in possession, and holding a contract for the purchase, raises a strong presumption that his possession was under that contract; and this possession becomes conclusive when, as in this case, there is no evidence to rebut that presumption. (*Jackson v. Croy*, 12 *John.* 427.) (2.) It makes no difference whether the contract contains any clause giving a license to enter: the question is, is the defendant in possession? If so, is he not a tenant at will under it? (*Jackson v. Johnson*, 5 *Coven*, 74, 78, 79, 90, 91, 99. *Cooper v. Stower*, 9 *John.* 361.) (3.) It matters not whether it appears

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that the possession was commenced under the contract or not : even if it appears that it commenced before the contract, but was continued after and not clearly in opposition to it, it will be regarded as being under the contract. And in the present case there is no proof whatever of any possession before the contract. (*Jackson v. Lewis*, 10 *John*. 435. *Jackson v. Ayres*, 14 *Id.* 225.)

II. The title proved by the plaintiff was not good, because James Kellogg was a tenant at will or sufferance, and therefore he had no interest which could be sold by execution at law. The statute, (1 *R. S.* p. 722,) declares that an estate at will or by sufferance shall not be liable to sale on execution. (4 *Kent's Com.* 110, 116.) (1.) A person who is in possession of premises for which he has a contract of purchase is a tenant at will or by sufferance, though his contract contains no express license to enter. (*See cases cited above* ; *Jackson v. Johnson*, 5 *Cowen*, 74, 78, 9, 90, 1, 99 ; *Cooper v. Stower*, 9 *John*. 331.) III. The judge erred in excluding the answer as evidence. (1.) It was admissible evidence. The original answer, filed, sometimes called the office copy, would be good evidence ; and the paper served as a copy upon the opposite party is evidence equally good. (*Jackson v. Harrow*, 11 *John*. 434. 2 *Cow. Tr.* 925, 6. *Ripley v. Burgess*, 2 *Hill*, 360.) (2.) The evidence was relevant : it would show the manner and circumstances of the defendant's possession. IV. The judge erred in holding that C. P. Kirkland was excused from answering because he was counsel for the plaintiff. V. The evidence shows that the plaintiff Pearl Kellogg owned two-elevenths of the whole premises, and the other plaintiffs seven-elevenths and two-thirds of one-eleventh thereof. VI. The pleadings show the same title. Pearl Kellogg having sold to the other plaintiffs some portion of his interest, cannot recover any thing under the first count ; for there he claims the whole and only the amount claimed (two-elevenths) under the third count ; and the other plaintiffs may recover seven-elevenths and two-thirds of one-eleventh under the second count. (*Borst v. Griffin*, 9 *Wend.* 307. *Bear v. Snyder*, 11 *Id.* 593. *Harrison v. Stevens*, 12 *Id.* 170. *Van Alstine v. Spraker*, 13 *Id.* 578. *Holmes v. Seeley*, 17 *Id.* 75. *Hin-*

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man v. Booth, 21 *Id.* 267. *Ryerss v. Wheeler*, 22 *Id.* 148; *S. C.* 25 *Id.* 434. *Gillet v. Stanley*, 1 *Hill*, 121. *Cole v. Irvin*, 6 *Id.* 634. 2 *R. S.* 304, §§ 5 to 10, 30. 3 *Id.* 707, 2d ed.) VII. The plaintiffs owning only two-elevenths, seven-elevenths and two-thirds of one-eleventh, nine-elevenths and two-thirds of one-eleventh, a part of the premises, must belong to some other person, and therefore as only a part of the tenants in common have brought the action, they should be nonsuited, or at least can not recover. (1 *R. L.* 80, § 2. *Malcom v. Rogers*, 5 *Cowen*, 188. 2 *R. L.* 341, § 11. *Cole v. Irvin*, 6 *Hill*, 634, 638, 9. 2 *R. S.* 232, § 22. *Gra. Pr.* 830. 1 *Ch. Pl.* 189. 2 *Phil. Ev.* 265. *Adams on Ej.* 186. 4 *Cranch*, 165. *Jackson v. Bradt*, 2 *Caines*, 169.) VIII. The judge erred in excluding the evidence which the defendant proposed to give when the witness Barker was recalled. (1.) The testimony was offered in season. The witness had just left the stand, and was still in court; neither party had summed up, nor had the terms of the verdict been agreed upon. (*Gra. Pr.* 290. *Jackson v. Tallmadge*, 4 *Cowen*, 450. *Legget v. Boyd*, 3 *Wend.* 379.) (2.) The testimony offered was not irrelevant. IX. If after all it is held that the plaintiff can recover, then the verdict should be for the plaintiff Pearl Kellogg for two-elevenths of the premises; and for the other plaintiffs for seven-elevenths and two-thirds of one-eleventh.

By the Court, ALLEN, J. The plaintiff, Pearl Kellogg, when the evidence was closed on the part of the plaintiffs, was entitled to a verdict for the whole premises, in fee, under the first count in the declaration. The evidence showed the defendant in possession of the premises at the time of the recovery of a judgment against him, by virtue of an execution issued, upon which the premises were afterwards sold, and a continued possession in him from that time to the time of the commencement of the suit, and that Pearl Kellogg had acquired the title of the defendant under the sale upon that execution. (*Jackson v. Town*, 4 *Cowen*, 599. *Jackson v. Parker*, 9 *Id.* 81. *Jackson v. Graham*, 3 *Caines*, 188. *Day v. Alverson*, 9 *Wend.* 223.) But it is insisted, on the part of the defendant, that the title ac-

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quired by Pearl Kellogg, under the judgment and execution, was not valid, because the defendant was in possession under a contract for the purchase thereof from Pearl Kellogg, and that therefore he had no interest which could be sold by execution at law. By statute the interest of a person holding a contract for the purchase of lands is not bound by the docketing of a judgment or decree, and can not be sold by execution thereon. (1 R. S. 744, § 4 to 6.) In this case the defendants did not acquire any right to the possession of the premises under the contract to purchase. It was a naked contract of purchase, and was silent upon the subject of possession. A right of entry did not follow from such contract. (*Suffern v. Townsend*, 9 John. 55. *Cooper v. Stower*, Id. 331.) There is no evidence of a parol license to the defendant to enter as a purchaser under the contract, and if there was it would not aid the defendant; for such parol license, and the possession in pursuance of it, would be an interest in the land distinct from the interest acquired under the contract, and would be subject to sale by execution. The statute only exempts from such sale the interest acquired by the contract. The chancellor, in *Talbot v. Chamberlin*, (3 Paige, 219,) says, "I am inclined to think that if the defendant is in possession under and by virtue of the contract to purchase, his possession under that contract, can not be sold on execution at law." "But the provision of the statute can not protect the possession of the defendant in the execution from a sale by the sheriff, unless he holds that possession as a part of his interest acquired under the contract to purchase. In this case it appears that the defendant had no right to the possession of the land under any contract for the purchase thereof. The contract with Talbot gave him no such right, and he can not set up a parol agreement not contained in the written instrument. If such a parol possession was given it was not a part of the contract to purchase, which the statute requires to be in writing." In *Griffin v. Spencer*, (6 Hill, 525,) the defendant was entitled to the possession under his contract. Bronson, J. says, "Possession is a part of the interest acquired under the contract, and if the defendant has no other right to the property there is nothing

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on which a sale at law can operate." We can not presume, in this case, that the defendant entered and acquired the possession under and by virtue of his contract of purchase. The contract itself is in evidence, and gives no such right, and leaves no room for presumptions. In *Jackson v. Croy*, (12 John. 427,) cited by the defendant's counsel, the court held merely that the repeated applications of the defendant to the plaintiff to purchase the premises before he took possession, afforded strong presumption that he came into possession under the plaintiff. No contract was proved, and the evidence was submitted to the jury with other circumstances, and with a view to rebut the evidence of adverse possession which was relied upon by the defendant, and whether the entry was under the contract or any other license was wholly immaterial. The possession, in either case, was not adverse. And if we presume, in this case, that the defendant entered in pursuance of a parol license then, as we have seen, the possession thus acquired was the subject of a sale on an execution, and the plaintiff Pearl Kellogg acquired it under the sheriff's sale. But whether the defendant entered into possession of the premises with or without the license and permission of the plaintiffs, having taken from one of them a contract for the purchase, and treated him as the owner, he would not be permitted, in an action of ejectment by the vendor, to set up his possession as adverse to the title of his vendor. His possession would be deemed consistent with the title of his vendor, and to this extent, and no further, do the cases cited and relied upon by the defendant's counsel go. (*Jackson v. Johnson*, 5 Cowen, 74, *Cooper v. Stower*, 9 John. 331. *Jackson v. Sears*, 20 Id. 440.) And these decisions are all based upon very familiar principles not at all affecting the questions before us in this case.

It is next insisted, in behalf of the defendant, that the title proved by the plaintiff, under the sheriff's sale, was not good because James Kellogg was a tenant at will or sufferance, and therefore he had no interest which could be sold by execution at law. And to maintain this position it is assumed that the defendant, at the time of the sale on the execution, was in pos-

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session of the premises under his contract for the purchase. But there was no evidence of this. On the contrary, the contract not giving him a right of entry, his possession must be referred to some other right or some other contract, and what that right was, or what were the terms of that other contract, does not appear. If he entered under his contract, his possession would be protected from sale by execution as an interest acquired under and by virtue of his contract, and not as an estate at will. Although for some purposes the entry of a purchaser upon the purchased premises is called an entry as by a tenant at will, yet the estate of the vendee can not be said to be an estate at will or at sufferance. In *Cooper v. Stower*, (9 John. 331,) the contract, without containing a clause giving the vendee a right of entry upon the premises, did contain a clause from which the defendant insisted that a license to enter was necessarily to be implied, and it was in reference to that part of the contract that the court say, that the most that can be implied is, that the defendants were at liberty to enter as tenants at will, and to occupy the land in a reasonable manner as other tenants at will might do; but whether such license to enter was to be implied in that case was not decided. The action was trespass, for waste, and the court held that even if the vendee had the right to enter, as was contended, he had no greater right to commit waste than a tenant at will would have had; that is, that a license to enter was not a license to commit waste. Doubtless, in many respects, the rights and duties of a vendee in possession under a contract of purchase, are very like those of tenants at will, at sufferance, for years, for life in dower, or by curtesy; but it by no means follows that he has the *estate* of either class of such occupants. There is no tenancy; the relation of landlord and tenant does not exist; he is not entitled to notice to quit, and can not be dispossessed by summary proceedings. His possession may be likened to that of a tenant, for many purposes, but his "estate" is *sui generis*, and does not come within the act exempting "*estates*" at will or by sufferance from sale on execution. (1 R. S. 722, § 5.) An estate at will is where one man lets land to another to hold at the will of the lessor. (4

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Ken's Com. 110.) A tenant at sufferance is one that comes into possession by lawful title, but holdeth over by wrong. (*Id.* 116.) The defendant has not brought his estate within either definition.

The copy answer of the plaintiff Pearl Kellogg to a bill in chancery, filed against him by the defendant, was rightfully excluded as evidence. As a copy of the answer on file it was to be proved as other transcripts, that is, by a witness who had compared the copy line for line with the original, or who had examined the copy while another person read the original. (1 *Phil. Ev.* 386. *Cowen & Hill's Notes*. p. 1065, note 719.) Had the trial been in the same court, and in the same cause, the office copy of the answer served by the solicitor of the plaintiff would have been competent evidence. (1 *Phil. Ev.* 387. *Cowen & Hill's Notes*, 1068. *Roscoe's Cr. Ev.* 187. *Burnand v. Nerot*, 1 *Car. & P.* 578.) And probably if the trial had been in another court but in the same cause in which the answer was put in, as upon the trial of a feigned issue in that cause, the answer would have been evidence. (*Highfield v. Peake*, 1 *Moody & Malkin*, 109.) And this is the extent of the rule. In *Jackson v. Harrow*, (11 *John.* 434,) the copies of affidavits offered in evidence had been served in the same cause, as the foundation of a motion to permit the defendant against whom they were offered, to defend the action in place of his tenant. So in *Ripley v. Burgess*, (2 *Hill*, 360,) copies of the pleadings in the cause were used on an interlocutory motion in the same court and in the same cause in which they had been served. But secondly, the evidence was incompetent for the purpose offered; that is, to prove that the defendant was in possession of the premises under his written contract. He could not have been in possession under that, as it did not authorize an entry; and if the entry was in virtue of any other license or contract, the possession was not protected from sale on execution. (3 *Paige*, 220. 6 *Hill*, 525.) Mr. Kirkland, the counsel, was properly excused from producing the deeds in his possession, and which he had received in his character as coun-

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sel, and from speaking of their contents. (*Jackson v. Dennison*, 4 *Wend.* 558. 1 *Phil. Ev.* 140. *Cowen & Hill's Notes*, 276.)

As the evidence stood at the close of the trial, the plaintiffs were entitled to recover the whole premises, although not precisely in the proportions claimed in the declaration. The only variance was, however, in the claim of Pearl Kellogg, who had in one count claimed the whole of the premises, and in the other three-eleventh parts thereof. The evidence showed him entitled to recover three-elevenths and one-third of one-eleventh. The rights of the other plaintiffs were truly stated. In determining the rights of the parties, we lay out of view the testimony of Barker, that Pearl Kellogg was reputed to own only three-elevenths of the premises. It was not competent evidence to limit his right. Without reviewing the cases, or examining the statute at length, we think the plaintiffs are entitled to recover according to the proof, and the declaration may be amended accordingly. Such are the decisions in *Borst v. Griffin*, (9 *Wend.* 307;) *Bear v. Snyder*, (11 *Id.* 593;) *Harrison v. Stevens*, (12 *Id.* 170;) *Van Alstyne v. Spraker*, (13 *Id.* 578; *Hinman v. Booth*, (21 *Id.* 267;) *Ryerss v. Wheeler*, (22 *Id.* 148;) *S. C.* (25 *Id.* 434;) *Truax v. Thorn*, (2 *Barb. S. C. Rep.* 156;) *Vrooman v. Weed*, (*Id.* 330;) *Van Rensselaer v. Jones*, (*Id.* 643.) In *Holmes v. Seeley*, (17 *Wend.* 75,) the court say that a better way, upon the trial of an action of ejectment, is to disregard a variance in description of the quantity of interest, and allow a verdict to be taken according to the proof, leaving the plaintiff to apply to amend his declaration. *Gillet v. Stanley*, (1 *Hill*, 121,) followed *Holmes v. Seeley*, and in *Cole v. Irwin*, (6 *Hill*, 634,) the question did not arise and was not decided; and these are all the cases upon the subject. We have no doubt of our right to do what the judge upon the trial might have done—disregard the variance—and we have the additional right to authorize an amendment of the declaration, which we do.

The view we take of the rights of the plaintiffs, obviates the necessity of passing upon a question made by the defendant upon the assumption that the plaintiffs were entitled to recover only

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several undivided parts of the premises, and less in the aggregate than the whole, viz. that if two or more tenants in common unite in an action of ejectment, all must unite under the provisions of 2 revised statutes, 341, section 11, which is a re-enactment, in substance, of section two of the act for regulating the process and proceedings in assizes and other actions. (1 R. L. 80.) This act was not designed to affect proceedings in the action of ejectment proper, but to obviate a difficulty which existed in real actions and prevented those having a common interest from uniting in a writ of right, (*Jackson v. Bradt*, 2 *Caines*, 169,) and does not now apply to actions of ejectment, unless they are brought as substitutes for a writ of right. (*Cole v. Irvine*, 6 *Hill*, 634.) But in the action of ejectment, there never in this state was any difficulty in tenants in common uniting in the action; and as their right to unite did not depend upon the statute which received a construction in *Cole v. Irvine*, there is no necessity as there is no reason for applying the principle there decided. In *Jackson v. Bradt*, there was a recovery of ten-twelfths of the premises, showing that it was not then considered necessary that all the tenants in common should unite in the action, although several had done so. (See also 4 *Cranch*, 165.)

It rested in the sound discretion of the judge, at the trial, to admit further evidence after the trial had once closed; and as there was no complaint that the defendant was taken by surprise or had before the time he offered the evidence been unable to procure the attendance of witnesses in court, we can not say that the discretion was improperly exercised. (*Jackson v. Tallmadge*, 4 *Cowen*, 450. *Leggett v. Boyd*, 3 *Wend.* 379. *Leiland v. Bennett*, 5 *Hill*, 286, 289. *Cowen & Hill's Notes*, 712, 718.) And there is some doubt whether the evidence offered would have been competent at any stage of the trial. (*Jackson v. Town*, 4 *Cowen*, 599. *Jackson v. Graham*, 3 *Caines*, 188. *Jackson v. Parker*, 9 *Cowen*. 81.) But we rest our decision upon the ground that the admission or rejection of the evidence at the time it was offered, was in the discretion of the

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judge upon the trial. The plaintiff, Pearl Kellogg, is entitled to judgment for three-elevenths and one-third of one-eleventh, and the other plaintiffs are entitled to judgment for seven-elevenths and two-thirds of one eleventh of the premises.

Judgment accordingly.

SAME TERM. *Before the same Justices.*

ZEITER vs. BOWMAN and LINESCOTT.

Although a chattel mortgage is not assignable or negotiable, at law, yet a party taking an assignment of such an instrument acquires rights, and an interest in the debt secured and the property pledged, which courts of law as well as of equity will recognize and protect.

The maxim *pendente lite nihil innovetur* prevails to the extent that whoever purchases or acquires the title to property *pendente lite*, takes it subject to any decree which may be made in respect to it, in the pending suit.

Where, during the pendency of a foreclosure suit, a person takes a lease of the mortgaged premises, from the mortgagor, and gives to him a chattel mortgage to secure the rent, and the chattel mortgage is subsequently assigned to a third person, the assignee takes the assignment subject to all the equities and legal infirmities which can attach to it by reason of the final decree in the foreclosure suit, although he is not a party to such suit. But he is not bound by any proceeding to compel the tenant to attorn to a receiver and pay rent to him, unless he has notice of the application, and an opportunity to be heard.

So far as the claim of such assignee, under his chattel mortgage, is concerned, he stands in the place of the landlord and lessor, and is entitled to be heard on an application for an order to appoint a receiver, and directing the tenant to attorn and pay rent to such receiver.

A court of equity will examine the equities of the several claimants of the rents, issues and profits of mortgaged premises during the pendency of proceedings to foreclose the mortgage; without reference to the time of the accruing of the equities, and whether they accrued *pendente lite*, or before the commencement of the proceedings. *Per ALLEN, J.*

Where a mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises, for the security of his debt, he has no equitable right to them, as against the assignee of a chattel mortgage given by the tenant to the mortgagor, to secure the payment of the rent.

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And when, in such a case, the mortgagee obtains an order upon the tenant to attorn to a receiver appointed in a foreclosure suit, all that the mortgagee is entitled to is the immediate possession of the premises, as security for the payment of his debt.

If the tenant has gone into possession *pendente lite*, the mortgagee is entitled to an order that he yield possession, or pay rent from that time to a receiver. But he has no right, in any event, to an order—especially as against the equitable rights of others—which will in effect vest him with the possession, *nunc pro tunc*, as of a time anterior to the application.

DEMUURER to replication. The declaration was in replevin for one wagon, one plough, one cow, and other property. The defendants pleaded separately. Bowman pleaded, 1st, the general issue; 2dly, property in himself; 3dly, that previous to the taking complained of, to wit, on the 1st of April, 1847, the plaintiff made and delivered to William N. Weaver, his certain personal mortgage upon the property in question, to secure the payment of \$100 on or before the 1st of November, 1847, by which it was covenanted and agreed that in case default should be made in the payment of that sum, or if the mortgagor should attempt to remove or make sale of the goods and chattels, without the consent of the mortgagee, &c. it should be lawful for the mortgagee, with the aid and assistance of any person, to enter upon the premises of the mortgagor, and take and carry away the goods and chattels and dispose thereof, and pay himself out of the proceeds. And it was agreed that the mortgagor should remain in the possession of the property, until default should be made. That after the execution and delivery of such mortgage, and before the taking in the declaration complained of, to wit, on the 15th of April, 1847, Weaver, for a valuable and sufficient consideration, in due form assigned the said mortgage, and the demand secured thereby, to the defendant Bowman; that the mortgage and assignment, at the times of the execution thereof, respectively, were duly filed in the office of the clerk of the town of Deerfield, where the plaintiff resided; of which assignment the plaintiff, at the time of the execution thereof, had notice; and that after such assignment, and before, and at the time of the taking in the declaration complained of, the amount of money secured by the mortgage was due and

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owing by the plaintiff to the defendant, and while it was so due and unpaid, to wit, on the 31st of March, 1848, the defendant Bowman being the bona fide owner and holder of the mortgage, delivered the same to the defendant Linscott, a deputy sheriff, to seize and levy upon the mortgaged property, sufficient to pay the debt then due upon such mortgage to the defendant Bowman; and that Linscott thereupon levied upon the property in the declaration mentioned, each and every part of which was included in the mortgage, for the purpose of selling the same at public auction, pursuant to the terms of the mortgage, to make the amount due on the mortgage, as he lawfully might; which was the same taking, &c.

To this plea the plaintiff replied that the said William N. Weaver, previous to the giving of the chattel mortgage, to wit, on the 1st of April, 1847, demised and leased to him, the plaintiff, certain premises situate in the town of Deerfield, for the term of one year, at the rent of \$100, fifty dollars payable on the 25th of August, 1847, and the residue on the 1st of November, 1847. That thereupon the plaintiff executed and delivered to said Weaver the said chattel mortgage, to secure to him the payment of the rent aforesaid, and for no other purpose; that the plaintiff then resided, and still resides, in the town of Deerfield, Oneida county, and that the mortgage was filed by Weaver in the clerk's office of the county of Oneida, in the city of Utica, and not in the office of the clerk of the town of Deerfield. That Weaver, prior to the demising of the premises to the plaintiff, to wit, on the 7th of April, 1846, executed and delivered to one Amasa Weaver, a valid mortgage on said premises, to secure the payment of \$1700, part of the purchase money thereof, payable, \$1000 on the 18th of March, 1847, with interest, and \$700 on the 18th of March, 1848, with interest; which mortgage was duly recorded on the 5th of June, 1846; that on the 27th of March, 1847, no part of the principal or interest having been paid on said mortgage, the said Amasa Weaver filed his bill in the court of chancery, against the mortgagor, and others having prior and subsequent liens on the mortgaged premises, to foreclose the mortgage. That on the same day the said Amasa

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Weaver caused to be duly filed in the clerk's office of Oneida county, a notice of the pendency of such suit; that on the 23d of August, 1847, and during the pendency of such suit, the said Amasa Weaver presented a petition for the appointment of a receiver in such suit, and praying that the mortgagor, William N. Weaver, might be required to deliver to the receiver the lease entered into by the said William N. Weaver with the plaintiff, and also the chattel mortgage, and that the said William N. Weaver, and the said plaintiff, and any person who might become tenant of the premises previous to the sale under the decree of foreclosure, might be required to attorn to such receiver, and to pay to him the rents and profits thereof; that on the 24th of August, 1847, an order was made, appointing Horace R. Bigelow receiver in that suit, according to the prayer of such petition; that the said receiver having given and filed the bond required by the order of the court, the plaintiff attorned to him, as tenant of the said premises, in pursuance of, and in obedience to such order; and paid to such receiver the rent reserved to be paid to the said William N. Weaver in the lease so given as aforesaid, and secured by the said personal mortgage, previous to the taking of the goods by the defendant; and that notice of the assignment of the chattel mortgage was never given to the plaintiff; concluding with a verification.

To this replication the defendant Bowman demurred, and specified the following causes of demurrer. 1. That the facts set forth in such replication were no sufficient answer to the matters pleaded in the defendant's third plea. 2. That the replication was bad for duplicity, in that it stated and set forth more than one pretended answer to such plea. 3. That it did not appear in or by the said replication that the defendant was in any way a party to the foreclosure suit mentioned in the replication.

The pleadings between the plaintiff and the defendant Linscott were substantially the same as the above; Linscott justifying the taking of the goods as deputy sheriff, in pursuance of Bowman's directions, under and by virtue of the chattel mortgage.

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C. A. Mann, for the plaintiff. I. Bowman took the assignment of the personal mortgage *pendente lite*, and subject to all the equities and rights which could attach to it in the hands of Weaver, his assignor. II. The order for the appointment of a receiver of the rents and profits was valid, as against all the parties in the foreclosure suit, and all persons who had acquired any interest in the subject matter of that suit *pendente lite*, and payment of rent by Zeiter to the receiver was a valid payment of the rent, and a discharge and satisfaction of the personal mortgage given to secure the rent. III. The replication is not bad for duplicity; as all the facts averred tend to one single ground of defence. IV. The 151st section of the code of procedure, which was made applicable to pending suits, declares that the court shall, in every stage of an action, disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party. If the objection as to duplicity is well taken, it is obviated by this provision of the code.

C. A. Doolittle, for the defendants. I. The replication, to be good, must show a state of facts which at law extinguishes the demand the defendant Bowman had against the plaintiff, and the lien he had on his property. II. The personal mortgage was a good and valid security, as against the mortgagor, whether it was filed or not. III. The personal mortgage, and the demand secured by it, were assigned to the defendant Bowman before the foreclosure suit was commenced; and it does not appear that he ever had any notice of the foreclosure suit or the pretended payment to the receiver. IV. The defendant Bowman was not a party to the foreclosure suit. His rights, therefore, cannot be affected by it. A valid lien held by him on the property of the plaintiff could not be impaired or destroyed by the determination of a suit to which neither the plaintiff nor the defendant were parties, and of which they had no notice. V. It does not appear by the replication that a case existed for the appointment of a receiver, or that the court had jurisdiction to appoint one. The order appointing the receiver was obtained without notice, or rather it does not appear it was obtained on

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notice to any one. (8 *Paige*, 565, 568. 5 *Id.* 38. 3 *Edw.* 588. 1 *Barb. Ch. Pr.* 660. 5 *Cowen*, 202.) VI. It is alleged in the plea, and not denied in the replication, that the plaintiff, at the time the assignment was made, had notice that the demand, the payment of which was secured by the personal mortgage, was assigned to the defendant Bowman. VII. It is not pretended in the replication that the plaintiff did not know the personal mortgage was assigned to the defendant; although the plaintiff avers "notice of the assignment of the personal mortgage was never given to him." VIII. If the debtor knows, or has good reason to suspect, a demand not negotiable has been assigned, a payment to the original creditor, after the assignment, will not discharge the demand, although no notice has been given him of such assignment. (12 *John.* 343. 9 *Id.* 64. 1 *Cowen's Tr.* 61.)

By the Court, ALLEN, J. Although the chattel mortgage under which the defendants seek to justify was not assignable or negotiable at law, still by the assignment Bowman had acquired rights and an interest in the debt secured and the property pledged, which courts of law as well as of equity will recognize and protect. (*Jackson v. Blodget*, 5 *Cowen*, 202. *Anderson v. Van Allen*, 12 *John.* 343. 9 *Id.* 64.) The replication does not aver that Bowman was a party to the suit for the foreclosure of the mortgage, or had notice of, and an opportunity to be heard on, the application for the order under which the plaintiff claims to have paid rent to the receiver in that suit, and by such payment to have discharged the chattel mortgage under which the defendants claim the property in question.

But it is claimed on the part of the plaintiff that he, having rented the mortgaged premises and given the chattel mortgage to secure the rent after the commencement of the suit to foreclose the mortgage, all parties are bound by the order of the court requiring him to attorn to the receiver in that cause. The maxim *pendente lite nihil innovetur* prevails to the extent that whoever purchases or acquires the title to property *pendente lite* takes it subject to any decree which may be made in respect to

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it in the pending suit. (*Story's Eq. Jur.* §§ 405, 6, 908, and note (5) to last section.) But the order under which the plaintiff claims to have satisfied the mortgage of Bowman, by payment to a third person, was not a decree in that suit affecting the title to the property in litigation, but was an interlocutory order made in a proceeding collateral to the principal cause, and not necessarily incident to that suit. The defendant Bowman doubtless took the assignment of the chattel mortgage subject to all the equities and legal infirmities which could attach to it by reason of the final decree in the cause, although he was not a party to the suit, but he was not bound by any proceeding to compel the tenant to attorn and pay rent to the receiver, without notice of the application, and an opportunity to be heard. (*Sea Ins. Co. v. Stebbins*, 8 *Paige*, 567.) So far as his claim under the chattel mortgage was concerned he stood in the place of the landlord and lessor, and was entitled to be heard on the application.

A court of equity will examine the equities of the several claimants of the rents, issues and profits of mortgaged premises during the pendency of proceedings to foreclose the mortgage, without reference to the time of the accruing of the equities, and whether they accrued pendente lite or before the commencement of the proceedings. It is not a claim of right on the part of the complainant, founded upon his contract, but an equitable claim addressed to the sound discretion of the court; and in this respect it differs from his claim to a decree for foreclosure of the mortgage and sale of the mortgaged premises. The complainant in the foreclosure suit had neglected to take a specific pledge of the rents and profits of the mortgaged premises, for the security of his debt, and he therefore had no equitable right to them as against Bowman. (*Bank of Ogdensburgh v. Arnold*, 5 *Paige*, 38.) This was undoubtedly true as to the rent which had accrued up to the time of the application for the order upon the tenant to attorn; and all that the complainant then had a right to was a right to the immediate possession of the premises as security for the payment of his debt; that is, he was only entitled to an order against the tenant, the plaintiff in this suit, that he, having gone into possession pendente lite, yield

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possession or pay rent from that time, to a receiver. But he was not entitled in any event to an order, especially as against the equitable rights of others, which should, in effect, vest him with the possession nunc pro tunc as of a time long anterior to the application.

In no event can the order be held to have authorized the payment to the receiver of rent as for the use and occupation for time past; and if the order was valid as against Bowman as to the residue of the time, the rent should have been apportioned and a pro rata share paid to Bowman as the assignee; and that not having been done the seizure of the goods by the defendants was justified; and the replication is bad.

But we think that the defendant Bowman was not bound by the order, or the acts of the plaintiff in obedience to it. It was the duty of the plaintiff, having notice of Bowman's rights, to give him notice of the proceeding; and if such notice had been given and the application opposed, there is but little reason to suppose that it would have been successful. The whole amount of the mortgage money was not due, and as against third persons having equitable rights, it would have required a peculiar case to authorize the order. (*Bank of Ogdensburgh v. Arnold, supra.*) But we can not review that order. It is sufficient that Bowman was not a party to the suit, and had no notice of the application for an order which it is now claimed so seriously affected his right, not to the property in dispute but to an independent security.

Judgment must be given for the defendants on the demurrer, with leave to the plaintiff to amend on payment of costs.

SAME TERM. *Before the same Justices.*

RATHBONE vs. STANTON.

The verdict of a jury should be set aside when there has been no evidence to support it.

When there is a *disputed question of fact*, and evidence has been given on *both sides of such question*, the court will not disturb the finding of the jury. But when upon any one question which is decisive against either party, there is evidence on one side of such question and none on the other, and the verdict has been given for the party who has given no evidence upon the point in question, the verdict will be set aside.

And if the county court does not reverse a judgment of a justice, founded on such verdict, it is the duty of the supreme court to correct the error.

ERROR to the Oswego county court. Rathbone sued Stanton, before a justice of the peace, and declared against him for the use and occupation of a certain farm in the town of Constantia, from April 2, 1842, to January 20, 1847, claiming \$100 damages. The defendant pleaded the general issue, and gave notice of set-off for clearing land, splitting rails, building fences, paying taxes, erecting buildings, for moneys advanced, labor and services, goods and wares, &c. The cause was tried by a jury. Abner H. Allen, the plaintiff's agent, testified that in the spring of 1842 he let the farm to the defendant for two years from the 2d of April following. The rent of those two years was to be paid in improvements upon the farm. At the end of that term Stanton applied to the witness for the premises during another year; the rent to be paid in improvements. The witness told Stanton he was not authorized to let the farm excepting for money; and if he, Stanton, occupied the same another year, he must pay \$50 and taxes, unless he could obtain better terms of Rathbone. That Stanton remained on the premises, and to the knowledge of the witness no other terms were obtained, either of Rathbone or his agent. That at the expiration of the third year Stanton applied to the witness for further occupancy of the farm, and proposed to build a barn on the same, for the further use of them. He proposed to build a barn 26 by 36 feet, to be finished in a certain specified manner, the materi-

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als to be taken from the premises. Such a barn was estimated to be worth, when completed, \$90, and Stanton regarded it as equivalent, with the taxes, to two years' rent. That the witness then informed Stanton that he was not authorized to contract for such a barn, but would submit the proposition to Rathbone, and that he did so, by letter. That Rathbone replied, proposing that the barn should be 30 by 40 feet, with a better finish. When this was communicated to Stanton he replied that it was too late, as he had commenced getting the timber of a different size, and should not alter it. That witness closed no bargain with Stanton. On his cross-examination the witness stated that he made no bargain to erect a barn; and that the one erected by Stanton was of a different description from the one proposed by Rathbone, and was not finished when this suit was commenced. That at the expiration of the first two years the improvements, agreed to be made by Stanton, not being completed, the witness called upon Daniel Pettibone and Orrin Humaston, who went with him on to the premises and gave it as their opinion that it would require \$15 to make the improvements as agreed by Stanton. That Henry Willard afterwards gave it as his opinion that it would cost \$25 or \$30. Pettibone and Humaston were sworn as witnesses, on the trial, and testified that it would cost \$15 to make the contract good. Beebe, another witness, testified that it would cost \$30, and Gale that it would cost \$25. Stanton proposed to prove by way of set-off that he had made improvements on the farm to the full value of the use thereof; to which Rathbone's attorney objected, excepting so far as Stanton should show that said improvements were, by agreement, to be allowed or accepted by Rathbone in payment for use and occupation; and so the justice ruled. L. Stanton, a witness for the defendant, testified that he was present when the defendant first applied to Allen for the premises; that Allen said there were not much improvements on the premises, and proposed that Stanton should cut and clear off two nooks, square the clearing up, and enclose it in a rail fence, for which improvements he could have the use of the place two years; that no writings passed; that Allen wished Stanton to

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pay the taxes, which was objected to; that witness did not know whether the clearing had been made, as agreed, or not. Jabez Barnard testified that he recollected Stanton speaking with A. H. Allen for the use of the premises; that Stanton objected to paying cash, saying he wanted to pay in improvements; that Allen required the rent to be paid in cash. Abner H. Allen, a witness for the plaintiff, recalled, testified that Stanton commenced building a barn 26 by 36 feet, covered with boards that were rotten and shaky, doors also of rotten boards; that the stable was not yet finished, nor the barn underpinned. Other witnesses testified that it would cost from \$15 to \$20 to finish the barn in a proper manner. It was proved that a barn of that size, when well finished, would be worth from \$80 to \$100. Vine A. Allen testified that he went on to the premises with A. H. Allen two or three years ago; that Stanton proposed to Allen to take grain, cattle, &c. as security for the rent then due. The cause was, without further testimony, submitted to the jury, and they rendered a verdict in favor of the defendant; whereupon the justice gave a judgment for the plaintiff for \$3,77, the costs of suit; and the county court, on certiorari, affirmed the judgment of the justice; and the plaintiff brought his writ of error.

J. H. Rathbone, for the plaintiff in error.

S. Cromwell, for the defendant in error.

By the Court, GRIDLEY, J. There is at this day no doubt, and there never should have been any, that the verdict of a jury should be set aside where there has been no evidence to support it. The doctrine found in the 10th *Wendell's Rep.* 411, 413, 425, has been since reconsidered and materially modified. The true doctrine is this: When there is a *disputed question of fact*, and evidence has been given on *both sides of such question*, the courts will not disturb the finding of the jury. But when upon any one question which is decisive against either party, there is evidence on one side of such question and none

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on the other, and the verdict has been given for the party who has given no evidence upon the point in question, the verdict will be set aside. (18 *Wend.* 141.) And if the county court does not reverse a judgment founded on such a verdict, it is the duty of the supreme court to correct the error.

In this case, upon the right of the plaintiff to recover there was no conflict of evidence. It is true that the lease for the two first years was void inasmuch as it was not in writing; but it was fully executed—the defendant occupied the premises and never performed his agreement to pay the rent, in full, and therefore for that balance, whatever it might be, the plaintiff was entitled to recover.

So too of the rent for the subsequent years. If there be no agreement to accept the rent in any other way than in cash, the rent is recoverable in money. But if there was any evidence authorizing the conclusion that the plaintiff by his acquiescence and that of his agent, in the erection of the barn, of different dimensions from those proposed by the plaintiff, still there is no pretence that the defendant erected a barn of sufficient value to satisfy the rent.

The verdict of the jury was therefore without evidence; and to allow it to stand would sanction an act of gross injustice. The judgment of the county court, and of the justice, must consequently be reversed.

Judgment reversed.

SAME TERM. *Before the same Justices.*

WALROD & POTTER vs. BENNETT.

Where, in an action brought by two or more persons, for an unlawful taking of property, the defendant answers that the plaintiffs are not joint owners of the property, that averment is *material*, and is *new matter*, requiring a reply.

Such an allegation falls directly within the provision of section 144 of the code

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of procedure; and if not specifically controverted by the reply, it will be taken as true.

No evidence is required, to establish a fact thus pleaded and not replied to, nor is evidence contradicting it admissible.

If evidence contradicting such an averment is given, it will be not within the issue, and therefore unavailing; unless the defendant waives the objection, on account of the misjoinder of plaintiffs.

Before the defendant will be held to have lost his rights under the pleadings, given by the code, it should appear very clearly that he waived those rights on the trial.

The admission of evidence that is improper, without objection, is not conclusive evidence of such waiver.

APPEAL, by the plaintiffs, from a judgment of the county court of the county of Onondaga. The facts sufficiently appear from the opinion of the court.

R. H. Gardner, for the appellants.

Hillis & Wells, for the respondent.

By the Court, GRIDLEY, J. This case comes before the court on an appeal from the order and judgment of the county court of Onondaga county, directing a new trial. The appellants recovered a judgment before the justice, which the county judge pronounced erroneous; and the question here is, whether that decision was right.

The plaintiffs declared against the defendant for an unlawful taking of certain goods and chattels. The defendant denied all the allegations of the complaint, and in an amended answer averred "*that the plaintiffs were not joint owners of the goods and chattels mentioned in the complaint, and that they were not partners at the time of the alleged taking.*" No reply was interposed to this plea.

It can not be doubted that the averment that the plaintiffs were not joint owners of the goods sued for, is *material*, and is *new matter* requiring a reply. (1.) It is *material*. It is expressly made a ground of demurrer (when the defect is apparent on the face of the complaint) by the 4th subdivision of the 122d section of the code of procedure. An erroneous joinder of plain-

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tiffs is a defect, within the legitimate meaning of the act. The error did not appear on the complaint, but was set up in the answer pursuant to the 126th section of the code. It was therefore correctly pleaded in the answer. (2.) It was *new matter*. It was not a defence under the general denial, but had been specifically provided for in the 122d and 126th sections of the code, as a specific defence not to the merits but to the right of the plaintiffs, to bring a joint action, for the injury complained of. (3.) Being material, and setting up new matter, the case falls directly within the provision of section 144, which declares that "every material allegation of new matter in the answer, not specifically controverted by the reply shall, for the purposes of the action, *be taken as true*." No evidence was required to establish the fact thus pleaded and not replied to, nor was any evidence contradicting it admissible.

True, such evidence was given—but all such evidence was *without the issue*, and would have been unavailing in the court of chancery to the practice in which the rules of pleading introduced by the code bear a close resemblance. (*See 6 John. 543, 559, 565; 10 Wheat. 189; 1 Barb. Ch. Pr. 339.*) We do not however mean to decide that the parties may not be held to have waived, in a justice's court, the strict rights given by the pleadings. It is not necessary to decide that point now; and we do not. In this case, we are bound to believe that before the justice and jury the defendant relied on this erroneous joinder of plaintiffs under the pleadings. Under either the first or seventh grounds of error set forth in the defendant's affidavit, this point could properly have been urged; and when the plaintiffs did not deny it by an opposing affidavit, we think he should not do so here. Before the defendant should be held to have lost his rights under the pleadings, given by the plain language of the code, it should appear very clearly that he waived those rights on the trial. The admission of evidence that was improper, without objection, is not conclusive evidence of such waiver. The defendant may still have relied on, and asserted, his rights, both to the justice and jury, and under the allegations in the affidavit for the appeal, we must hold that he did so. If

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he did not, that should have appeared, by a denial on the other side. For, a party will not be held to have *abandoned* a clear and conclusive ground of defence given him by the statute, without the clearest evidence.

The order of the county court must be affirmed with costs.

SAME TERM. *Before the same Justices.*

CARPENTER vs. BROWN.

Where, upon the sale and purchase of land, the vendor covenants to deliver a deed of the premises on a certain specified day, and the purchaser has paid the consideration and there is nothing for him to do as a condition precedent, the duty of the vendor, to deliver the deed on the day fixed, is absolute. He should therefore prepare the deed, and be ready to deliver it when demanded. One request, (even if any request is necessary,) is enough to put him in default.

In an action for the breach of such an agreement, a request or demand need not be laid specially. It is sufficient for the plaintiff to allege, generally, that the defendant was often requested to execute a deed. The omission to allege a time and place is not an available objection to the declaration, in arrest of judgment, or on general demurrer.

Where the declaration, in such a case, alleged a refusal, and a continued refusal, by the defendant, to execute a deed, although often requested; *Held* that such allegation both implied and excused a special request by the plaintiff, and was therefore sufficient.

The dictum of Savage, Ch. J. in *Connelly v. Pierce*, (7 Wend. 129,) that when a vendee does not tender a deed ready drawn he should call on the vendor and request the execution of a deed, and after waiting a reasonable time, call again to receive it, overruled.

ERROR to the common pleas of Madison county. The facts are stated in the opinion of the court.

W. J. Hough, for the plaintiff in error.

S. T. Fairchild, for the defendant in error.

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By the Court, GRIDLEY, J. This is a writ of error, brought to review the judgment of the court of common pleas of the county of Madison. Carpenter prosecuted Brown in that court in an action of covenant upon a sealed agreement, reciting that one Hepsibah Tainter had sold and assigned to the defendant, certain five acres of land which he had formerly sold to her; and that the defendant had sold to the said plaintiff the same five acres of land and received his pay in full therefor, and then *covenanting* to give the said Carpenter a good warranty deed of the said five acres, on the first day of April, 1843. The plaintiff then averred that the defendant did not on the first day of April, 1843, nor at any time since, execute to the plaintiff a deed of the said five acres, pursuant to said agreement; but that on the contrary thereof, the said defendant, though often requested so to do, had hitherto wholly neglected and refused to execute such deed, &c. The defendant pleaded a special plea to this declaration, in which he set up as a defence that after the said first of April, 1843, and before the commencement of the said suit, the plaintiff obtained an article of one J. D. Ledyard for the said five acres, thus preventing the defendant from procuring a deed from said Ledyard, of the premises which the defendant had purchased by contract. To this plea, the plaintiff demurred, and assigned for special causes of demurrer, 1st, that the defendant did not show that said article was obtained before the breach of the covenant, and 2dly, that it was not averred in the said plea that the defendant was either incapacitated or discharged from performing his contract by the acts of the plaintiff. The defendant joined in demurrer, and the court below gave judgment against the plaintiff, on the ground that the declaration was insufficient. There were other issues of fact, which have been found for the plaintiff, with which however this writ of error has nothing to do.

It is not claimed, upon this argument, that the plea can be supported either on principle or authority; but it is strenuously argued that the declaration is *bad in substance*. If it be, then the judgment of the common pleas can not be disturbed.

The defendant's counsel insists that it was incumbent on the

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plaintiff to *demand* the execution of the deed ; to *wait a reasonable time* for the defendant to execute it ; and then *again demand* its delivery ; and several authorities are relied on for this principle. In the case of *Hubbard v. Fuller*, (6 Cowen, 1,) the action was on the common counts to recover back the consideration money, on the ground that the contract was rescinded. By the contract, the money was payable by instalments, and it was provided that after the whole was paid the vendor should convey. The money was not punctually paid, and the last balance was not paid until long after the last instalment was payable by the terms of the contract. The vendor was dead, and the heirs from whom the deed was to come were numerous and scattered. It was in reference to such a case that the court held that a demand of the executors alone was not enough. And that decision was manifestly right. The money not having been paid at the time when the same was due, the representatives could not foresee when the last sum would be paid, so as to entitle the vendee to a deed, nor whether it ever would be paid so as to make it necessary to have one prepared. It was therefore proper that when the last payment was made, and a deed demanded, the vendee should wait to have it prepared and executed. And inasmuch as the execution was to be by absent and distant heirs, the executors should have a reasonable time to procure the deed to be executed. It is also said in this case that by the English rule, it was the duty of the vendee to prepare the deed ; but that principle was not necessary to be decided in that case, and it was not decided. Again ; in the 3d of Wendell, 250, the general principle laid down in *Hubbard v. Fuller* is spoken of with approbation. And in *Connelly v. Pierce*, (7 Wend. 129,) Ch. J. Savage states the same general doctrine laid down in *Hubbard v. Fuller*, but he declares that it has never been held, in this state, that the vendee is to prepare and tender the deed. But he does say in general terms, that when the vendee does not tender a deed ready drawn he should call on the vendor and request the execution of a deed, and after waiting a reasonable time, call again to receive it. There was no necessity for the announcement of such a

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doctrine in that case. The remark was obiter, and we think is not the law of the land. This is a suit for the breach of a contract to give the plaintiff a deed on the 1st of April, 1843. The purchase price had been fully paid, and there was nothing for the plaintiff to do as a condition of, or prior to, the performance by the defendant of his agreement. Why then should the plaintiff be required to call *twice*? If the *time* when the vendor would be bound to give his deed had been left uncertain, as in the 9th Wendell, 135, and as it became by the neglect of the vendee to make his payments by the day in the 6th Cowen, 1, there would be some reason in saying that a reasonable time should be granted after the payment of the money and the demand of the deed. But in this case the time was fixed for the delivery of the deed on the 1st of April, and the consideration having been paid, the duty was *absolute* on the defendant to deliver his deed on that day. He should therefore have prepared the deed and been ready to deliver it when demanded. *One* request (even if a request at all were necessary) was enough to put the defendant in default.

But it is said that, though *one* request or demand should be held to be all the vendee was bound to make, that should be laid specially, stating the particulars of time, place and person. If an *actual* request was necessary, it undoubtedly should be laid specially. And it is equally true that by the old authorities the omission of a special request was bad on general demurrer and even after verdict. (*See 1 Ch. Pl. 364, and 5th Term Rep. 409.*) That strict rule, however, no longer prevails. Mr. Chitty, at the last cited page of the 7th American edition, adds, "But from the principle deducible from other cases and a recent decision, it should seem that a judgment by default or a verdict would aid the defect, and *that the objection must now be taken by special demurrer.*" In *Bowdell v. Parsons*, (10 East. 369,) the court overrule the case in the 5th Term Reports, 409, and say, "the omission to allege a time and place in describing the special request in the declaration, is not an available objection in arrest of judgment, or on general demurrer." This last decision was followed by the court in *Dowling & Ryland*, 55, in

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a case for breach of promise of marriage, where it was necessary to aver a request.

It is surprising that this defect was ever held available, except on special demurrer. For when it is alledged that the defendant was often requested to execute his deed, &c. the *substance* of what was necessary to alledge to lay the foundation of a breach is manifestly averred by the pleader. The defect is a want of certainty in relation to the time, place and other circumstances attending the request ; and uncertainty is generally a mere defect of form, and is only reached by a special demurrer. (*See 1 Chit. Pl. 271, 290, 717.*)

The case relied on by the defendant's counsel in the 7th Wendell, 129, is also an authority in favor of this declaration. To a declaration in many of its features like this, the defendant pleaded that he had not been requested to execute the deed, and that he had not refused to execute it. The defendant demurred specially for duplicity, and the court held the demurrer well taken, and decided in favor of the plaintiff ; whereas, had the declaration (which alledged a general and not a special request,) been bad in substance for that reason, the plaintiff having committed the first fault, should have been defeated.

Again ; there is another and a distinct ground why the declaration should be held good. The declaration alleges a *refusal* and a *continued refusal* by the defendant to execute the deed, notwithstanding the request. Now the case just cited from the 9th Wendell, 129, holds that the plea was double, for the reason that the denial of any request, and the denial of any neglect and refusal was each a *bar*. If, however, the defendant *did refuse* to execute the deed, and continued to do so up to the commencement of the suit, he has certainly broken his covenant. In *North v. Pepper*, (21 Wend. 636,) it was held that where a party gave notice to the plaintiff that he had determined not to take his farm, and that he abandoned the agreement and refused to perform, such refusal dispensed with an offer or a readiness to perform on the part of the plaintiff, as it showed that such a step would have been but an idle ceremony. (1 Term Rep. 683. 5 Cowen, 506.) So, in this case, if the de-

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defendant *refused to perform*, that both implies and excuses a request. The judgment of the court of common pleas must be reversed, and a judgment entered against the defendant, upon the demurrer.

We have nothing to do with the other issues in the case. They were not properly a part of the demurrer book, nor of the error book, and the bill of exceptions not being before us, we can not decide whether any error has been committed by the court below upon the trial of the case or not. (*See 1 Ch. Pl. 707, a.*)

Judgment reversed.

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74h 17

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SAME TERM. *Before the same Justices.*

OLMSTED and others vs. LOOMIS and GRAVES.

As a general rule, grants or reservations, in conveyances of water privileges, should be deemed absolute rather than limited to the particular objects specified; unless it clearly appears from the conveyance that the contrary was intended; such a construction being most favorable to the interests of the community.

Accordingly, although in a grant of a water-power the grantor reserved sufficient water to carry a forge and two blacksmith's bellows, yet it appearing that those objects were mentioned, not for the purpose of prescribing the use to which the water reserved should be applied, but simply as a measure of quantity; *Held*, that the grantor, and those claiming under him, had a right to apply the reserved water to another purpose, viz. the propelling of a paper mill; provided a greater quantity was not used than would be requisite for the objects particularly specified.

It is well established that a court of equity has concurrent jurisdiction with courts of law in cases of private nuisance. But it is equally well established that it is not every violation of the rights of another which may be ranked under the general head of nuisance, which will authorize the interposition of the equitable powers of the supreme court.

Such interposition rests upon the principle of a clear and certain right to the enjoyment of the subject in question; and it must also be a case of strong and imperious necessity; or the right must have been previously established at law. A court of equity will not interfere for the purpose of settling the respective rights of parties in the use of water, and determining the quantity the plaintiff is en-

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titled to use, in propelling certain machinery ; to restrain the defendant, by injunction, from drawing the water from a dyke, so as to deprive the plaintiff of the use of a sufficient quantity to carry his machinery ; and to protect the plaintiff in the undisturbed use of the water ; where the defendant does not dispute or contest the plaintiff's rights, when the quantity of water he is entitled to shall be ascertained, but the plaintiff's rights have not been established at law. It seems the plaintiff has an ample remedy at law, in such a case. To authorize an injunction there should be not only a clear and palpable violation of the plaintiff's rights, but the rights themselves should be certain, and such as are capable of being clearly ascertained and measured.

IN EQUITY. The bill in this cause alledged that in May, 1802, Jonathan Wales and wife, being the owners of a certain piece of land in the Oriskany patent, embracing a mill-privilege, on which C. Wales had previously erected a forge for manufacturing iron, and two blacksmith's bellows, which were then in operation, sold and conveyed to Alfred Smith and others certain other premises, describing them, "with the privilege of digging from the head of said race to said land for the purpose of conveying water sufficient to carry an oil mill." And Wales agreed that the grantees *should have the privilege of the water that was not wanted for the forge and two blacksmith's bellows.* In 1806 or 1807, Wales converted the forge into a paper mill, using the water he had before used in the iron manufactory in the manufacturing of paper. The bill alledged that when Wales executed the above conveyance he expressly reserved sufficient water to carry the said forge as then in use, and which consisted of a forge hammer and two fires blown by two bellows each, which were then in use, and also for two blacksmith's bellows thereafter to be erected, which at all times thereafter were to have the preference in the use of the said water. On the 9th of February, 1822, Jonathan Wales and wife conveyed to Walter Olmsted and Chauncey Isbell the premises first above mentioned, "with the privilege of water as the said Jonathan Wales then owned it." The plaintiffs averred, in their bill, that the privilege of water as then owned by Wales was to have sufficient water to use the said forge, consisting of the forge hammer, two fires with two bellows to each fire, and of using water for two blacksmith's bellows, in addition, and which said forge

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hammer and bellows would require the constant use and discharge of a column of from 700 to 800 cubic inches of water to carry the same. Shortly after the execution of this conveyance Chauncey Isbell died; and such proceedings were had that the portion of the premises owned by him was conveyed to Jonathan Wales. Wales and wife conveyed the same to William S. Peck by deed dated March 10, 1829. And by divers conveyances the plaintiffs now claim the premises first above mentioned, as owned by Jonathan Wales at the time the deed from him and wife to Alfred Smith and others was executed, in May, 1802. The defendants Loomis & Graves claim to own the title which was conveyed to Smith and others by Wales and wife, in and by the last mentioned deed. The bill alledged that ever since the said forge was converted into a paper mill, in 1806 or 1807, such paper-mill has been run, and has had the preference of water, and at all times enjoyed and used sufficient to carry the same, unmolested and undisturbed in the full use and enjoyment of the same until about the 1st of January, 1847; that it takes less water to propel the paper mill, &c. as the plaintiffs and others have used the same, than was used while the forge was in operation; that the plaintiffs, or some one of them, have carried on the paper mill and used the water to grind the rags, to drive the machine to glaze the paper, and to drive the pump to wash the rags, for the last sixteen years; and at all times during that period had the first privilege of the water to propel such machinery, which has at all times been conceded to them by owners and occupants of the oil mill, which was situated where the paper mill owned by the defendants now stands. That the defendants' paper mill is situated on the site of the old oil mill, on the same dyke or race which conducts the water to the plaintiffs' paper mill, about 25 rods higher up the race or dyke than the plaintiffs' paper mill, and about two rods from the said race, and that some time during the last season the defendants caused their dyke or race leading from said main race to their mill, to be dug down so that they could draw nearly all the water from the dyke or race leading to the plaintiffs' paper mill, and could so draw as to entirely prevent the plain-

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tiffs from using the same. That the defendants purchased the premises owned by them, in 1846; that such premises had, for a long time before, been used for an oil mill, which was changed by the defendants into a paper mill, contrary to the true intent and meaning of some or all of the grants through which they have derived title; that since their paper mill got into operation, in 1847, they had frequently, and at all times, when there was no more than sufficient water in the dyke or race to carry the plaintiffs' paper mill, and also when there was not sufficient to carry both paper mills, used or drawn down the water in the dyke or race, so as to obstruct, hinder, and prevent the plaintiffs from having sufficient water to carry their paper mill, and retarding and hindering them from carrying on their business, and depriving them of the use of the water which had been conveyed to them, and which had been excepted in the several conveyances under which the defendants claim title; the plaintiffs insisting that they, at all times, have used less water with their paper mill than was conveyed to them by their deeds, and was excepted in the conveyances under which the defendants derive title. The plaintiffs prayed for an injunction to restrain and prohibit the defendants from drawing the water from the dyke or race, so as to deprive the plaintiffs of the use of water sufficient to carry the forge, consisting of the said forge hammer and two fires, with bellows to each fire, as they were at the time of the reservation in the title under which the defendants claim, and two blacksmith's bellows, to be propelled by water, as conveyed to the plaintiffs by their several grants, and as excepted in the deed from Wales and wife to Smith and others, under which the defendants claimed title, and as the same existed and was used prior to 1806; that the plaintiffs might have the undisturbed use of the water for their paper mill; that they might be decreed to have and enjoy, at all times hereafter, the necessary and what would be sufficient water for a forge, &c. according to the exception in Wales' deed; that they might have the undisturbed use of the water for the paper mill; that the rights of the plaintiffs and the defendants might be decreed and settled between them; and that the defendants might be decreed to

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pay costs; and for general relief. The defendants put in an answer, and proofs were taken, and the cause was heard upon pleadings and proofs. The facts appearing in evidence sufficiently appear from the opinion of the court.

Foster & Bennett, for the plaintiffs. The defendants derive title through a deed from Jonathan Wales, dated May 4, 1802, which conveys for an oil mill the privilege of water that is not wanted for a forge and two blacksmith's bellows. The plaintiffs derive title from Wales by deed of 9th Feb. 1822, of all his privileges of water "as he owned it." I. Wales, being the general owner at the time of the grant, had a right to use the balance of water not granted, for any purpose he pleased. But, the grantees, Smith, Loomis, and Trowbridge, only took what was specifically granted, and were limited in the use, to the particular object for which it was conveyed. (*Ashley v. Pease*, 18 *Pick.* 268.) II. When a right exists, to use a certain quantity of water for propelling machinery, a change may be made in the mode and object of the use, and in the plan of using it, if the quantity used is not increased, and the change is not to the prejudice of others. (*Whittier v. Coheco Manufacturing Co.* 9 *N. Hamp. Rep.* 454. See *U. S. Dig. Sup.* vol. 2, p. 925; *Id.* vol. 3, p. 642, §§ 35, 40; *Blanchard v. Baker*, 8 *Greenl.* 253; *Johnson v. Rand*, 6 *N. Hamp. Rep.* 22.) III. The person holding a subordinate right to the water was bound to shut down his gate whenever there was a deficiency. (*Sumner v. Foster*, 7 *Pick.* 32.) IV. The preference of water has been conceded to the plaintiffs and the persons from whom they derive title, from 1806 or 7 to within two years since. The defendants have converted the oil mill to a paper mill. V. There has been 42 years acquiescence of all parties concerned, in the change by the plaintiffs from a forge to a paper mill, and the quantity of water used for the paper mill, forty years without objection. VI. The proof shows that the whole stream, in low water, was insufficient to carry the forge and bellows. This is shown by the erection and abandonment of the trip hammer. Besides, a great number of witnesses testify to it; and that,

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when the creek was at least one-third larger than at present. VII. The grant was for an oil mill, specifically, which only ran two or three months in the year—spring and fall—when high water; and the defendants forfeited their right to water when they made the change to a paper mill. It is fair to conclude that the grantor would not have sold for any other purpose. VIII. The reservation in the defendants' title has been always continued, and is the same in the deed from Bela Allen to Henry G. Loomis of the 10th Dec. 1845—always using the words "except also the privilege of the water of said creek that is not wanted for a forge and two blacksmith's bellows." Thus at all times conceding that amount of water to the plaintiffs. IX. The amount of water required for the forge and two blacksmith's bellows is shown to be far greater than the amount of water used for the plaintiffs' paper mill, and that the plaintiffs use no more water than they are entitled to. X. The plaintiffs having drawn the required amount of water for their paper mill, for more than 20 years before the defendants erected their mill, their rights became settled, to the amount used by them. XI. The defendants had no right to lower their flume so as to enable them to draw all the water out of the dyke. They wrongfully trespassed upon the plaintiffs' rights, in drawing down the water, and refusing to shut down their gate, so as to stop or even impede the plaintiffs' mills, and the plaintiffs are entitled to the relief prayed for in their bill.

S. Beardsley, for the defendants. I. This is not a case of chancery jurisdiction. But if it is a case cognizable in the court of chancery, the plaintiffs show no right to have a decree in their favor. (1.) Jonathan Wales is the common source of title to both parties. (2.) By his deed to Alfred Smith and others of the 4th of May, 1802, Wales gave to them, their heirs and assigns, an *absolute* right to sufficient water to carry an oil mill, and *beyond that quantity*, a right to all which was not wanted for the forge and two blacksmith's bellows. The defendants have all the right conveyed by that deed. II. The right reserved by Wales in his deed to Smith and others, if effective for

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any purpose, was only of the water "wanted for the forge and two blacksmith's bellows;" and the plaintiffs do not claim that they have been disturbed in the use, by them, of water for any such purpose. III. The plaintiffs, although their paper mill is near the site of the forge, are not on that site, nor does it appear they use the water at as good advantage as it was used in the forge. IV. The plaintiffs' claim of title is defective. V. If, however, the plaintiffs may, under the exception or reservation in the deed to Smith and others, or under the agreement of the same date with the deed, claim a preference of water sufficient to carry a forge with a hammer and four forge bellows, and also for two blacksmith's bellows, they have not shown that any such right has been violated by the defendants. (1.) The subject matter of the litigation, and on which the alledged rights of the parties are based, has been so much changed since 1802, when the deed was given, that no reasonably certain conclusion as to these rights, can be drawn from what is shown by the plaintiffs, in the bill, or by their testimony. (2.) The plaintiffs have not shown what quantity of water would be required for a forge, &c. or what quantity was used by this forge in 1802; nor that the quantity now used by them does not exceed what a forge, &c. would require; but the evidence on the part of the defendants does establish that the plaintiffs will require two or three times the quantity which would be needed for a forge.

By the Court, PRATT, J. The effect of the deed of 1802, from Wales to Smith and others, was to convey to them an absolute right to the surplus water, over and above what was necessary to carry the forge and two blacksmith's bellows. Although the oil mill is mentioned, both in the deed and the collateral agreement, as the object to which the water privilege was to be applied, yet the grant is in terms absolute, being the water which is not wanted for the forge and blacksmith bellows. The conveyance of the site is also absolute in its terms, and the covenant on the part of the grantees to keep one half the race in repair is not limited to any time, but is perpetual—all

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clearly indicating that the parties intended that the conveyance of the privilege should be absolute and perpetual.

I am also of the opinion that the reservation was intended to be absolute, and that the forge and two blacksmith's bellows are mentioned in the reservation not for the purpose of prescribing the use to which the water reserved should be applied, but simply as a measure of quantity. It is true that both the oil mill and the forge, in the contemplation of the parties at the time, were the immediate objects to which the water was to be applied; but they did not intend to be restricted in its application to those objects.

As a general rule, grants or reservations in conveyances for water privileges should be deemed absolute, unless it clearly appears from the conveyance that the contrary was intended; for such a construction is most favorable to the interests of the community. The water privileges furnished by the numerous streams in this country are continually increasing in value, and the interests of the public, as well as of the proprietors, are best subserved by the free and unrestricted application of such privileges to such machinery as the wants of the community may require. In the early settlement of the country saw mills, grist mills, and carding and cloth dressing mills for custom work were most in demand to supply the wants of the early settlers; and hence, in most of the early conveyances of water powers, allusion is made to some of that kind of mills. But they are rapidly going out of use, and cotton and woollen factories, paper mills, and other machinery adapted to the present business of the country, are taking their places. If, therefore, conveyances in which the former are mentioned in connection with the water privilege conveyed, are to be construed as limiting the use of the water, the alternative will only be left to the proprietor between continuing the application of the water to such uses or losing it entirely. In that case it would often continue to be applied to uses comparatively unprofitable, rather than to be wholly lost by the owner.

It is true that a given conveyance is to be construed so as to carry into effect the intention of the parties, when that intention

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can be ascertained from the instrument itself. But when there is doubt, that construction should be adopted which will render the grant absolute, rather than limited; and such is the general result of the later decisions. (*See Ashley v. Pease*, 18 *Pick.* 265; *Bigelow v. Battle*, 15 *Mass.* 313; 4 *Coke*, 86; *Cromwell v. Seldon and others*, decided in this court; 6 *N. Hamp.* 22; 21 *Wend.* 290.)

But in this case a more important question is presented for the consideration of this court, viz.: Whether a case is made out by the allegations in the bill and proofs taken in the cause, to authorize this court to grant the relief prayed for in the bill. It is well established that a court of equity has concurrent jurisdiction with courts of law in cases of private nuisance. (*Angell on Water Courses*, 174. *Eden on Inj.* 269. 2 *John. C.* 165. *Story's Eq. Juris.* §§ 925 to 930.) But it is equally well established that it is not every violation of the rights of another which may be ranked under the general head of nuisance which will authorize the interposition of the equitable powers of this court. Such interposition rests upon the principle of a clear and certain right to the enjoyment of the subject in question, and it must also be a case of strong and imperious necessity, or the right must have been previously established at law. (*Angell on Water Courses*, 175. *Story's Eq.* 925 to 930. *Van Bergen v. Van Bergen*, 3 *John. C.* 282. *Reed v. Gifford*, 6 *Id.* 19. 4 *B. & C.* 8.)

To authorize an injunction there should be not only a clear and palpable violation of the plaintiff's rights, but the rights themselves should be certain, and such as are capable of being clearly ascertained and measured. What are the rights of the plaintiffs as set forth in the bill? If we have come to a correct conclusion as to the construction which should be given to the deed of 1802 from Wales to Smith and others, the plaintiffs and defendants have both the right to draw water from a common race or dyke; the plaintiffs sufficient to carry a forge and two blacksmith's bellows, and the defendants the remainder; the plaintiffs having the preference when there is not water enough for both. The plaintiffs alledge that their paper mill takes no

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more than that quantity of water. Conceding that to be so, what is the injury complained of? It is that the defendants "got their paper mill into operation about January, 1847, and have frequently and at all times when there was no more water in the dyke than sufficient to carry the plaintiffs' mill, and also when there was not sufficient to carry said mill and the defendants' mill, used and drew down the water in the dyke so as to obstruct, hinder, and prevent the plaintiffs from having sufficient water to carry their paper mill, retarding and hindering the plaintiffs from carrying on their business, and depriving them of the use of the water."

This contains the whole grievance alledged against the defendants. There is no allegation showing what part of the time, if any, there was not sufficient water for both, nor the extent of the injury inflicted upon them. Nor is there any allegation that the defendants claim or insist on any rights inconsistent with those of the plaintiffs, or that there is any reason to apprehend a continuance of the encroachment upon the plaintiffs' rights. For aught that appears in the bill, the alledged violations of the plaintiffs' rights were merely the result of accident, or at most carelessness on the part of the defendants in using water from a common race; doing the plaintiffs no permanent or great injury. There is nothing to show that a suit at law would not afford the plaintiffs ample relief. But perhaps we ought to notice the allegation in the bill that the defendants had deepened their race; for perhaps that was also intended to be alledged as a violation of the plaintiffs' rights. But there is no allegation that a race to the defendants' mill, capable of drawing water from the bottom of the dyke, necessarily conflicts with the plaintiffs' use of the water, or is not necessary to enable the defendants to use the water to which they are entitled, to the best advantage. We are therefore not authorized to say that the defendants by deepening their race have done wrong.

Let us then assume that the allegations in the bill have all been clearly proved, do they show the plaintiffs entitled to the relief prayed for? And that is all the plaintiffs can ask. They can claim nothing for any case they have made out by their

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proofs different from that stated in their bill. The maxim *allegata et probata* is applied with strictness to cases in equity. (*James v. McKernon*, 6 John. 543.) This leads us to an examination of the relief prayed for in the bill.

The prayer is that the rights of the parties may be decreed, and that the defendants may be restrained by injunction from drawing the water from the said dyke so as to deprive the plaintiffs of the use of the water, sufficient to carry the forge, as it was at the time of the conveyance from Wales to Smith and others, and two blacksmith's bellows, and that the said plaintiffs may have the undisturbed use of the water for their paper-mill. Now, as before observed, the bill does not show that the defendants contest or dispute these rights. And hence the only object or benefit of an injunction would be to give the plaintiffs a summary method of punishing the defendants for any accidental or careless, or wilful violation of their rights. We have been unable to find a case in the books where, under such circumstances, this extraordinary remedy has been granted. It would still leave the whole disputed point, to wit, the actual amount of water to which the plaintiffs are entitled, undisposed of. It would leave open for a contest upon affidavits, upon every application for an attachment for breach of the injunction, the fact whether the plaintiffs had actually used as much water as they were entitled to under the deed of 1802. If we should attempt to settle the rights by measurement, the bill furnishes us no aid. It alleges that the old forge used from 700 to 800 cubic inches of water, but at what head the column was to be measured it is not stated. If we turn from the bill to the proofs, the difficulties in the way of granting the relief are not diminished. The evidence does not show that the defendants have denied the rights of the plaintiffs as reserved in the deed of 1802; but the question between the parties seems to be the amount of water necessary to carry a forge and two blacksmith's bellows. When that amount shall be ascertained, there is nothing in the evidence which shows that the defendants are disposed to deprive the plaintiffs of that quantity. What that quantity is, or at least whether the plaintiffs have been deprived of it, a court

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of law is quite as competent to determine as a court of equity. In fact the particular amount, for the purposes of the relief prayed for in the bill, it would not be necessary to ascertain. An approximation to correctness, in a court of law, would be sufficient. But should we attempt to ascertain the quantity of water to which the plaintiffs are entitled, the evidence is so conflicting that we should necessarily be left to conjecture. The plaintiffs' witnesses vary about one half in their estimates of the quantity used for the old forge; and the defendants' witnesses are about as conflicting. All who speak of the fact concur in saying that the old forge, owing to its being out of repair, used much more water than was necessary.

We do not construe the reservation as entitling the grantor to all the water which might have been used for the forge as it then was, but to all the water necessary for it when in reasonably good repair. What that quantity would be but few, if any, of the witnesses testified. The fact that the forge was changed into a paper mill, so soon after the conveyance of 1802 containing the reservation, that one of the owners of the oil mill assisted in its erection, and that the paper mill has been allowed to run so many years, undisturbed, affords strong presumptive evidence that the general use of the water for the paper mill, did not vary materially from the quantity previously used for the forge. Indeed, it is much more satisfactory than much of the testimony of the witnesses, in relation to the quantity used. But the wheels of the paper mills seem to have been changed in 1832, and the capacity of the spouts leading from the flume was increased, as I understand the testimony. Besides, it is also proved that in the year 1847, the flume and spouts to plaintiffs' mill leaked considerably, so that much water was wasted. It is therefore impossible, from the testimony, to ascertain the precise quantity to which the plaintiffs were entitled, or to determine whether, at the particular times when there was a deficiency of water, the plaintiffs, by unnecessary leakage and otherwise, were not using more water than they were entitled to. But suppose it were proved that the paper mill could not draw any more water than the plaintiffs are entitled to use,

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how can we protect them in the enjoyment of such right? Perhaps a point might be ascertained in the sides of the dyke, above which it would be proper for the defendants to draw, and the prism of the dyke below such point would be sufficient to convey the requisite quantity for the plaintiffs' mill, so that by compelling the defendants to draw above such point, they could not interfere with the plaintiffs' rights. But there is no evidence establishing such point; and if there were, it might turn out that the defendants could not use the surplus belonging to them to as good advantage, restricted in that manner, as they otherwise could.

It seems to us, therefore, that the difficulties in the way of attempting to restrain these parties, as the case now stands, within the limits of their legal rights, by process of injunction, are insuperable. In the language of the lord chancellor in the case of *Risson v. Hobart*, (3 *Myl. & Keene*, 169,) we may say, "What purpose could such an injunction serve? It would give no information; it would prescribe no (certain) rule or limits to the defendants. It could not, in any manner of way, be a guide to them if it did not operate as a snare. It would, in reality, amount to nothing more than a warning that if they did any thing which they ought not to do, they would be punished by the court; but it would leave to themselves to discover what was forbidden and what allowed. If after receiving such warning they acted upon the opinion of impartial men, and yet some damage followed, this court could not visit them very severely. The parties injured might then, indeed, recover damages at law, having leave to sue, but so they might of course recover damages if no injunction had issued, and without asking leave to sue."

If the defendants had no right to draw water from the dyke it would come within the cases in the books, and would be free from difficulty. But this case falls far short of those cases where the rights of the parties were clearly ascertained, and where the courts of equity have interposed by injunction for the purpose of preventing great and irreparable mischief. No such irreparable mischief is apprehended in this case; no threatened

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danger calls for such a remedy. A simple action at law to recover the damages, for any thing that yet has been made to appear, will be amply sufficient, not only to compensate the plaintiffs for the injury sustained, but to prevent a repetition of the wrongs on the part of the defendants.

We are, therefore, of the opinion, as well upon the matters of the bill as upon the proofs, that the bill should be dismissed. But as the difficulties in the plaintiffs' case appeared upon the face of the bill itself, and the defendants, instead of demurring, have put in their answer and have gone through a long, tedious, and unnecessary litigation, the bill should be dismissed without costs, and without prejudice.

Decree accordingly.

NEW-YORK GENERAL TERM, March, 1849. *Jones, Edmonds,*
and Hurlbut, Justices.

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 124a 233

FOWLER and others, Ex'rs of Ellsworth, *vs.* POLING, ST. FELIX and others.

If a deed conveys the possession of land, that is estate enough to carry along with it the covenants of warranty and for quiet enjoyment.

To authorize a recovery by a grantee upon the covenants of warranty, an eviction by legal process is not necessary. He may surrender possession to the rightful owner; and that will be a sufficient ouster to entitle him to his action.

A difference exists between an eviction under a covenant for quiet enjoyment, and one under a covenant of warranty. The former covenant relates only to the possession, and the eviction is merely required to be of lawful right; while the latter relates to the title, and the eviction must be not only by lawful right but by paramount title. *Per EDMONDS, J.*

To entitle a grantee to recover for a breach of the covenants of warranty and for quiet enjoyment, there must be an actual disturbance of the possession.

Where the covenantee is actually out of possession, either by due process of law, or by an entry of the rightful owner, or by a surrender to one having a paramount title, there is an eviction; the covenant is broken; and an action will lie.

Fowler v. Poling.

IN EQUITY. This was an appeal, by the defendants, from a decree made by a justice of this court at a special term. The decision appealed from is reported in 2 Barbour's Sup. Court Reports, 300, where the facts in the case are fully stated.

Tucker & Crapo, for the plaintiffs.

Geo. Wood, for the defendants.

By the Court, EDMONDS, J. The claim of the defendant is presented in the answer in two aspects. 1. Either that under covenants running with the land and the agreement of Mrs. Ellsworth as set up in the answer, he is entitled to what he has paid for obtaining releases, for the costs of the partition suit, and the value of the four lots set off in that suit; or 2. That under the covenants he is entitled to be repaid one-sixth of the consideration money expressed in Mrs. Ellsworth's deed to Bouton.

There is no doubt that the covenants of warranty, and for quiet enjoyment, enured to the benefit of the defendant; and there is nothing in the objection that no title passed, and therefore there was nothing for the covenants to run with. The deed conveyed the possession; and it is well settled that that is estate enough to convey the covenants along. And although one of the deeds to the defendant was only a quit-claim, and the deed to his grantor, under the master's sale, was the same, they were enough to pass the covenants to him. The matter was therefore correctly represented to Mrs. Ellsworth when she was told that under her deed to Bouton she was bound to make good to the defendant the defect which had been discovered in her title to a portion of the property. If she had then barely promised to make good that defect, it is questionable whether such a promise would be binding, for it would be merely a promise to perform her covenant. (*Miller v. Watson*, 5 Cowen, 195.) But such was not her promise as set out in the pleadings, or as proved. In the answer it is alledged that she authorized the defendant to take and pursue, at her cost, all such measures and proceedings as his counsel should deem necessary

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and proper to perfect his title and vest in him a good and absolute estate in fee simple, in severalty, in all the lands. Such a promise would be good. Her liability under her covenants, and the labor and expense which the defendant was to undertake and incur would be a sufficient consideration to sustain it. (*Miller v. Watson, supra.*) And under that promise the defendant might, perhaps, set up and be allowed the whole of his claim. But such was not the agreement which she made. It was represented to her that the heirs of Mrs. Rankin would probably release for a small sum, much less than she would have to pay under her covenant; and thereupon she agreed that the defendant might procure such release on the best terms, at her expense, and deduct the amount from the mortgage.

This promise also would be good, for the same reasons; but it by no means sustains the whole of the plaintiffs' claim. It does not sustain that part which is founded on the loss of the four lots by the partition suit, nor the expenses of the partition suit. It can sustain, at most, only the amount that it cost to obtain the releases. So far, then, as relates to the cost of the releases, the right to recover is founded solely on the parol agreement; and so far as the value of the four lots, and the expense of the partition, are concerned, the right to recover rests solely on the covenants. And in that light I proceed to consider the claim.

In regard to the agreement, it must be borne in mind that it had a condition attached to it, namely, that the releases should be obtained "gratuitously or for a very small consideration, much less than she would have to pay under her covenants." It was not a *carte blanche* to him—not, as he seems to have supposed both in his answer and in his conduct, authority to expend such sum as might be necessary and proper to perfect his title. But it had reference to a very small sum, much less than her liability under her covenants. Her liability under her covenant was \$1200, yet the defendant claims, for obtaining releases for part only, \$1176,11; leaving to be otherwise disposed of, four lots which he values at \$1200, besides \$623,96 for the costs of setting them off, making in the aggregate over \$3000 for perfecting his title. The small sum which she agreed

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to allow on the mortgage is thus swelled up to more than the whole amount due upon it, and instead of getting off with a sum much less than her liability on her covenants, it was equalled if not exceeded by this claim. To allow this claim would be a complete violation of the spirit of the agreement as proved, and would utterly deprive Mrs. Ellsworth of the limitation to her liability which she had provided by it, and instead of it, would substitute the agreement set up in the answer, and which is not proved. For the costs of the partition suit there is no foundation for any claim; for they are not comprehended in the parol agreement, and can form no part of the damages for a breach of the covenants of warranty or quiet enjoyment.

The claim as to the four lots rests upon different principles, and has no foundation, save in the covenants, which are not broken except by an actual eviction. An eviction by legal process is not necessary, but the grantee (or his assignee) may surrender possession to the rightful owner, and that will be a sufficient ouster to entitle him to his action on the covenant of warranty. It is true, the chancellor said, in *Hunt v. Amidon*, (4 Hill, 345,) in the court of errors, that the grantee had no right to give up voluntarily to a stranger claiming by title paramount; but his remark was obiter, and he was evidently mistaken. In *Hamilton v. Cutts*, (4 Mass. Rep. 349;) *Stone v. Hooker*, (9 Cowen, 154,) and *Greenvault v. Davis*, (4 Hill, 646,) the opposite doctrine was clearly laid down, with this restriction, that when the grantee surrenders, or suffers the possession to pass from him without a legal contest, he takes upon himself the burden of showing that the person who entered had a title paramount to that of his grantor. That burden was well sustained by the defendant in this case. He has clearly shown that the parties who entered upon these four lots had a title paramount to that of Mrs. Ellsworth. And the question is whether the circumstances of this case show such an eviction as would entitle him to recover under the covenants in respect to them; for in respect to the residue, which was released to him, he can have no pretence for recovering under the covenants, as there was no eviction of any kind, and his remedy for that part

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of his claim, if he has any, must be upon the agreement alone.

The only eviction was, that the defendant, in examining the title of Mrs. Ellsworth to the premises in question, discovered a defect in it, arising out of an imperfect execution of one of the mesne conveyances by Mrs. Rankin, and disclosed it to Mrs. Ellsworth. Thereupon, at her request, he instituted proceedings to perfect the title by procuring releases, and probably thus for the first time, the heirs of Mrs. Rankin became aware of their having an interest in the lands. Unable to procure releases in all instances, the defendant himself commenced a suit in partition, in which those four lots were set off to a portion of Mrs. Rankin's heirs, and it would seem that possession of those four lots was then surrendered by the defendant to them. So that all the proceedings, from the first discovery of the defect in the title to the final surrender of these lots, seem to have been on the mere motion of the defendant, and not of the parties whose title was paramount to his, and who might perhaps, but for his proceedings, have never asserted their claim, or at least have slept upon it, until his title should have become perfect by lapse of time.

But on the other hand Mrs. Ellsworth was a party to that partition suit, and he had a right under our statute, (2 R. S. 312,) to take proceedings to compel the heirs of Mrs. Rankin to assert or abandon their claim. He might not have been compelled to wait until those heirs voluntarily came forward with their claim; but finding it to exist, he might have compelled its determination so as to hasten his remedy under the covenants; though it may perhaps be questioned whether he would have been so ready to disclose the defect in his title and awaken the adverse claimants to the assertion of their rights, if he had been doing it at his own expense and not at that of some other person. It is under such circumstances that the question arises whether there was such an eviction as to constitute a breach of the covenants.

Upon this point the authorities are by no means uniform. In some of the states, (*Stewart v. Drake in New-Jersey*, 4

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Halst. 141,) it has been held that there must be a disturbance or deprivation or cessation of the possession by the prosecution and operation of legal measures. While in South Carolina an action may be sustained on the covenant of warranty, before eviction, by showing a paramount title. (*Biggers v. Bradley*, 1 *McCord*, 500.) A difference is also observable as to an eviction under the covenant for quiet enjoyment and that of warranty. The former relates only to the *possession*, and the eviction is merely required to be of lawful right, while the latter relates to the *title*, and the eviction must be not only by lawful right, but by paramount title. This may account for some of the discrepancies in the authorities, though it is not otherwise material in this case; for the deed of Mrs. Ellsworth contains both covenants, and it is enough to enable the defendant to maintain his claim, if either of them is broken. Thus, under the covenant for quiet enjoyment, it has been held that the eviction may be with or without judgment of court; (*Coble v. Wellborn*, 2 *Dev.* 388; *contra*, *Stewart v. Drake*, 4 *Halst.* 139;) that it is not broken by demand of possession made by one having title, (*Cowan v. Silliman*, 4 *Dev.* 46,) nor by a recovery against the covenantee, in trespass, by one claiming title, (*Webb v. Alexander*, 7 *Wend.* 281;) though *contra*, *Coble v. Wellborn*, *supra*;) nor by a recovery in ejectment without actual ouster; (*Kerr v. Shaw*, 13 *John.* 236; *Waldron v. McCarty*, 3 *Id.* 471; *Kortz v. Carpenter*, 5 *Id.* 120;) but that a decree in equity directing the covenantee to execute a deed and deliver possession is a breach. (4 *Dana*, 204; *Martin v. Martin*, 1 *Dev.* 413.) Hilliard lays down the doctrine that the covenant is broken when the adverse title is actually enforced by actual entry or acknowledgment of title to the injury of the covenantee; and that nothing more is necessary to sustain an action than an ouster or lawful disturbance. And he instances the cases of a mortgagee's entering for breach of condition and for the purpose of a foreclosure, and of a grantee's surrendering voluntarily to one having a paramount title. (2 *Hill. on Real Property*, 382.) So he might also instance cases, common in Massachusetts, where delivery of seizin by a sheriff to a creditor in satis-

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faction of an execution is held to be an eviction. (4 *Mass.* 512. 14 *Id.* 143.) So also, it has been held, that an entry by the plaintiff is not necessary; his deed giving him constructive possession is enough; and when there has been a sale at auction under a prior title, and the mortgagee became the purchaser, it was an eviction. (*St. John v. Palmer*, 5 *Hill*, 600.) In that case, the action was on this covenant. The premises were vacant, and were sold under a decree of foreclosure of a mortgage. The deed on the foreclosure was held of itself to transfer the possession, and thus constituted an eviction. In delivering the opinion of the court, Bronson, J. lays down the principle which governs this action, that if the covenantee never had possession, or if he had it and still retains it, no action will lie. The mere fact of a superior title in another never can amount to a breach of the covenant. His possession must be disturbed; he must be evicted; but he need not be evicted by legal process; it is enough that he has yielded possession to the rightful owner, or the premises being vacant, the rightful owner has taken possession. The test which he establishes is, whether the covenantee is still in the possession of the land. If he be, no action will lie; but if he be not, it will, the other requisites of lawful right or paramount title existing.

Under the covenant of warranty, it has been held that a final recovery in ejectment is a breach; (*Williams v. Wetherbee*, 1 *Aik.* 233;) that eviction in such a case is synonymous with ouster; (*Hamilton v. Cutts*, 4 *Mass. Rep.* 352;) and that a judgment in ejectment is not a breach. (2 *Hill*, 384. 5 *Harr. & J.* 414. 3 *Bibb*, 174. 1 *Mass.* 464. *Kerr v. Shaw*, 13 *John.* 136. 3 *Watts & S.* 407.)

In *Webb v. Alexander*, (7 *Wend.* 283,) the court say the covenantee ought not to stop short of an actual ouster, if he means to rely on his covenant, he has no right to make a compromise until an actual breach has been shown, and that a judgment in ejectment would not be sufficient, without showing the execution of a writ of possession under it. (*Contra, Hardin*, 292.) In *Whitbeck v. Cook*, (15 *John.* 490,) it is held that the covenant is broken only by an entry and expulsion from or some actual

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disturbance in the possession. (*S. P. Kortz v. Carpenter*, 5 *John*. 120. *Waldron v. McCarty*, 3 *Id.* 472.) Where the grantor remains in possession and sells to another, it is an eviction, and the covenant is broken. (3 *Fairf.* 499. *Martin & Yerger*, 58.)

From these conflicting authorities I deduce the true rule in this state, to be that there must be an actual disturbance of the possession; and that where the covenantee is actually out of possession, either by due process of law, or by an entry of the rightful owner, or by a surrender to one having a paramount title, there is an eviction, the covenant is broken, and an action will lie.

In this case there was a surrender to one having a superior title, and that under due process of law in a suit to which the covenantee was a party and in which she had a full opportunity to resist and impeach the claim which was set up as paramount to hers. To that extent, there was a breach of the covenant, for which the defendant has a valid claim in this suit.

In this view of the case, the defendant would be entitled to be allowed one-forty-second part of the consideration money, with interest. The majority of the court, however, are of opinion that the parol agreement is binding, to the extent of the amount actually paid for the releases to the releasers, excluding all the costs of the partition suit, of the application to chancery for the sale of the infants' lands, and the costs and counsel fees paid to the defendant's counsel in obtaining releases.

To that extent, the decree of the special term must be mod-

Decree accordingly.

SAME TERM. *Before the same Justices.*

BEACH vs. SOUTHWORTH and LITCHFIELD.

It is irregular to file an undertaking, given on taking an appeal, without the same having been proved or acknowledged, pursuant to the 120th rule.

A party appealing must serve upon his adversary copies of all the papers which he is required to file in order to perfect the appeal.

Accordingly held necessary to serve a copy of the certificate of a judge, obtained pursuant to section 299 of the code.

Notice must be given to the opposite party of the names and additions of the sureties to an undertaking given upon bringing an appeal.

Such notice must contain the names and additions of the sureties, specifying their calling or occupation, and, in the city, the number of the street where they reside.

An undertaking upon an appeal is of no validity or effect, unless it has been approved, in the first instance, by a judge of the court below.

But the want of an approval is such a defect as will not prejudice the rights of the party to whom, or for whose benefit, the undertaking has been taken; and it therefore comes within the provisions of the revised statutes relative to the sufficiency of bonds, and amending defects therein, and may be amended in that respect.

On appeals from *orders* made upon special motions, as distinguished from *judgments*, no security is required.

IN EQUITY. This was an appeal from an order made at a special term of this court, dissolving the injunction that had been issued, and denying the motion for the appointment of a receiver.

By the Court, EDMONDS, J. A motion is made to dismiss the appeal in this case, on several grounds. 1. Because the execution of the undertaking given on taking the appeal is neither proved nor acknowledged. To file an undertaking without that prerequisite is undoubtedly irregular. The 120th rule requires peremptorily that "all bonds or written securities shall be duly proved or acknowledged in the manner prescribed by law for the proof or acknowledgment of deeds of real estate, before the same shall be received or filed." This rule is still in force, and in no instance can an undertaking be received or

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filed, nor will any be approved by the judges of the court, unless duly proved or acknowledged pursuant to this rule.

2. The next objection is, that no certificate of a judge had been obtained, pursuant to section 299 of the code. It appears, however, that such a certificate had indeed been granted, but a copy of it was not served on the opposite party, with the notice of the appeal. This also was irregular. The party appealing must serve on his adversary copies of all the papers which he is required to file in order to perfect the appeal, so that the respondent may know, without being under the necessity of searching the clerk's office to ascertain, whether all the steps have been taken, which are necessary to making a perfect appeal.

3. Another objection is that no notice was given of the names and additions of the sureties to the undertaking. This also is an irregularity. The respondent has the right to except to the sureties when required, within a certain period after notice of the appeal. In order to enable him to do that, he must, with the notice of appeal, know who the sureties are; for unless he does, and he shall be compelled to go to the clerk's office, always, to find out who the sureties are, he may be deprived of a part or perhaps the whole of the time for exception which the statute allows. This notice of the sureties must contain their names and additions, specifying their calling or occupation, and in the city, the number of the street where they reside.

All these irregularities are merely in contravention of the rules of court which may be dispensed with on terms, so as to arrive at the substantial merits. But it is alledged that there is another defect in these proceedings which is in contravention of a requirement of a statute; and the question is whether that is fatal to the proceeding, or can be remedied by amendment. By section 290 of the code it is enacted that an undertaking upon an appeal shall be of no effect unless it be approved in the first instance by a judge of the court below, &c.

The undertaking on this appeal has not received such an approval, nor could it probably have obtained it; for it does not contain any description of the persons who executed it, which it certainly ought to do, as otherwise it might be difficult to as-

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certain what precise individual it was who had signed it or was to be bound by it.

In this respect this appeal is imperfect, if security is required ; for the undertaking, without such approval, can be of no effect. This being a requirement of a statute we can not dispense with it, as we may with those things which are required by our rules only. We can dispense with it only when authorized to do so by statute. The motion here is to amend these proceedings, by obtaining now the required approval.

There may be some doubt whether we could allow the amendment asked for, under the provisions of the code, because section 366, which allows the time within which any proceeding in an action must be had after its commencement and before judgment, to be enlarged, expressly excepts the time within which an appeal must be taken. The revised statutes however seem to have made provision for such a case.

By 2 R. S. 556, § 33, in regard to bonds, (for which undertakings are now substituted,) it is enacted that a bond need not conform in all respects to the form required by any statute, but the same shall be deemed sufficient if it conform substantially and do not vary in any matter prejudicial to the rights of the other party. By section 34, whenever such bond shall be defective in any respect, the court, officer, or body who would be authorized to receive it, or to entertain any proceedings in consequence of it, may amend the same *in any respect*, and thereupon it shall be deemed valid from the time of its execution.

The main object of the approval required in such cases must be to secure an undertaking which shall be good in point of form, since the sufficiency of the sureties is provided for by the exception and examination which is allowed. And the approval does not seem to be essential to the rights of the respondent, since it does not conclude him as to the validity of the undertaking, or the sufficiency of the sureties.

The approval is essential to the sufficiency of the undertaking as a part of the machinery necessary to taking an appeal, not to its validity as between the parties to it ; and the want of it is such a defect as will not prejudice the rights of the party to

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whom, or for whose benefit, the undertaking has been taken. It comes therefore within the 34th section of the revised statutes, and may be amended in this respect.

It is not, however, necessary for us to decide this point, because we are of opinion that on appeals from "orders" as distinguished from "judgments," no security is required; but we throw out these suggestions in the hope that by stating our views, we may do away with many of the irregularities which we are compelled so frequently to witness, and which seem to have their origin in entire forgetfulness of that provision of the code, (§ 389,) which enacts that the practice and rules of the court, where not inconsistent with the code, shall continue in force, subject to the power of the court over them as it now exists. By recollecting this, and practising accordingly, many of the defects alluded to would be avoided, and until that shall be done we shall be compelled to subject the erring party to the costs of correcting the errors, even when they do not affect the substantial rights of the parties.

In this case, the irregularity which has occurred, in taking the appeal, is the omission to serve the judge's certificate with the notice of appeal. If security had been required on the appeal, there would have been several additional irregularities, such as the omission to have the undertaking proved or acknowledged pursuant to the 120th rule; the omission to obtain the judge's approval of it, the omission of a proper description, in the undertaking, of the parties who have entered into it, including their names in full, residence and occupation, and the omission of a notice of the names and additions of the sureties. These things will be required in all cases where an undertaking is to be given under the code. But in this case these omissions are none of them irregularities, because no security is required upon an appeal on a special motion.

For the irregularity which has occurred here, as it does not affect the merits, we do not quash the appeal. We deny the motion, on payment of costs, on condition that the appellant forthwith serve a copy of the judge's certificate.

SAME TERM. *Before the same Justices.*

BROAD vs. HOFFMAN and others.

Under the statute of this state a broker is not entitled to charge more than one-half of one per cent for negotiating or procuring a loan, whatever may be the length of time for which the loan is made.

ASSUMPSIT, tried at the New-York circuit in October, 1847, before Justice MOREHOUSE. The plaintiff recovered a verdict for \$47, and the defendants, on a bill of exceptions, moved for a new trial.

R. M. Tysen, for the plaintiff.

Edward Hoffman, for the defendants.

By the Court, HURLBUT, J. This action is brought by the plaintiff to recover a compensation by way of commissions as a broker, for soliciting or procuring a loan for the defendants of some \$8000 for a period of years. The learned justice who presided at the circuit charged the jury that under the statute of this state a broker is not entitled to charge more than one-half of one per cent for negotiating or procuring a loan, whatever may be the length of time for which the loan is made; and if there had been any usage or custom to receive more than one-half of one per cent for procuring any loan, such usage was unlawful and could not be upheld. There was an exception to this charge. The statute referred to contains this provision: "No person shall directly or indirectly take or receive more than fifty cents for brokerage, soliciting, driving or procuring the loan or forbearance of one hundred dollars for one year, and in that proportion for a greater or less sum," &c. It is the same in substance with the statute of 12 Car. 2, and also with the third section of the statute for preventing usury, in the laws of New-York of 1813. In the revised statutes this provision has been separated from the statute of usury, and forms art. 1 of title 19, ch. 20 of part 1 of those statutes.

Broad v. Hoffman.

Perhaps, to its former connection with the statute of usury, may be attributed, what seems to be an irrelevant and improper insertion of the words "*for one year*" in the statute under consideration. The statute of usury of 1813 forbade any person from taking "above the value of seven pounds for the forbearance of one hundred pounds *for one year*," and prescribed that rate for a greater or less sum, "*or for a longer or shorter time*." In the third section of this act, which regulated the premium to brokers, the words "for one year" were employed, while the latter words, "or for a longer or shorter time," were omitted. The obscurity which this created seems not to have been considered by the revisers, and this section was re-enacted without any material alteration in the revised statutes.

If we are required to give effect to the words "for one year," we need the remaining language of the statute of usury, "and so in proportion for a greater or less sum, *or for a longer or shorter time*;" and with these words, the broker could claim a rate of compensation as well in proportion to the amount, as to the time of the loan, which he should procure. Without the latter words, it seems to be impossible to give effect to the words "for one year," without destroying the efficacy of the statute, by confining its operation to loans procured for a single year, and leaving the brokerage upon loans for more or less than a year to the contract of the parties. It can not be supposed that the statute was designed only to regulate brokerage on loans for a year, any more than that the statute of usury was designed only to regulate interest on loans for that period.

It was suggested on the argument, that we might perhaps give effect to the words "for one year," by holding the statute to be applicable only to loans procured for a year or more. We can not adopt this construction without withdrawing from the protection of this act numerous and important loans, which we think were clearly intended to be embraced in its provisions, and which the statute contemplates will be secured by "*bill, note,*" &c.; i. e. by ordinary commercial paper, payable in less than a year.

The plaintiff contends for a construction of the statute, which

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would give him one-half of one per cent for every year of credit on the loan, and which would in many if not in most cases increase his compensation, as his labor and difficulty in procuring the loan diminished; for it is well known that upon good security loans for three and five years are made with greater freedom by a large class of capitalists than loans for shorter periods.

We think the ruling of the learned justice at the circuit was correct, and that the motion for a new trial ought to be denied.

EDMONDS, J. dissented.

SAME TERM. *Before the same Justices.*

SAGE vs. HAZARD.

On the 2d of December, 1846, H. agreed to charter to S., and S. agreed to take from him, the ship *Jessore*, then on her passage from Havre to New-York. She was to be laden with flour by S. for Liverpool or London. And it was further agreed that should the said vessel arrive in New-York on or before the 10th of the said month of December, then the agreement was to be in full force, but should she not arrive on or before that time, S. had the option of continuing the agreement or not. The vessel did not arrive until the 26th of December, and S. on that day elected to continue the agreement. In an action by S. against H. for the non-performance of the contract on his part; *Held* that the promise of S. to charter the vessel furnished a good consideration for the promise on the part of H.; it being a case of mutual promises.

Held also, that the option reserved to S., of continuing the agreement, or not, terminated on the 11th of December, and could not be exercised after the arrival of the vessel, on the 26th.

There are cases where an option reserved to a party may be exercised within a reasonable time, and what is a reasonable time is a question of fact for the jury. But such a question can not arise where the agreement itself can be fairly construed to settle the time at which the option is to be determined. It then becomes a question of law for the court. *Per HURLBUT, J.*

DEMURRER to the first count of the plaintiff's declaration. The declaration alledged that on the 2d of December, 1846, the defendant agreed to charter unto the plaintiff, and the plaintiff

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agreed to take of and from the defendant, the ship *Jessore*, of New-York, at that time on her passage from Havre to New-York, having cleared from Havre about the 24th of September; to load with a full cargo of flour from New-York to Liverpool or London, at the option of the plaintiff, for and at the rate of four shillings and six pence sterling per barrel, with five per cent primage; the vessel to go consigned to the friends of the plaintiff, at Liverpool or London. That it was further agreed that the plaintiff should receive a brokerage of one cent per barrel on the flour, and that should the said vessel arrive in New-York on or before the 10th of the said month of December, then the agreement was [to be] in full force; but should she not arrive on or before that time, the plaintiff had the option of continuing the agreement or not. And the plaintiff averred that the vessel arrived at New-York on the 28th of December; whereupon the plaintiff, on the same day, according to the meaning and effect of the said agreement, elected to continue such agreement; of all which the defendant had notice. Averment of a readiness and offer to perform, on the part of the plaintiff, and of a refusal by the defendant; concluding to the plaintiff's damage \$5000. To this count the defendant demurred, and assigned the following causes of demurrer: 1. That the contract declared on terminated between the parties on the 10th of December, when the *Jessore* did *not* arrive. 2. That the declaration stated a further agreement, "but should she *not* arrive, on or before that time, the plaintiff had the option of continuing the agreement or not," but did not aver that he, in any way, on the 10th of December, or even the day following, gave notice whether he would continue the agreement or not; the vessel not arriving till the 28th of December, the plaintiff could not then elect to continue the agreement by notice, as averred, and on which notice alone the plaintiff founded his election, and which opportunity of election had passed eighteen days. 3. That on the whole count there was a portion of the contract counted on, left in abeyance, between the 10th of December, when the vessel did *not* arrive, and the 28th of December, when she did arrive, during which there was no mutuality

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between the parties, for want of an election on behalf of the plaintiff to continue the agreement or not.

G. R. J. Bowdoin, for the plaintiff.

W. Mulock, for the defendant.

By the Court, HURLBUT, J. On the 2d day of December, 1846, the defendant agreed to charter to the plaintiff, and the latter agreed to take from the defendant, the ship *Jessore* of New-York, which was at that time on her passage from Havre to New-York, having cleared from Havre about the 24th of September. She was to be laden with flour for Liverpool or London, at certain rates of compensation for freight. And it was further agreed, &c. *that should the said vessel arrive in New-York on or before the 10th of the said month of December, then the agreement was [to be] in full force—but should she not arrive on or before that time the plaintiff had the option of continuing the agreement or not.* The vessel did not arrive until the 28th of December, and the plaintiff on that day elected to continue the agreement.

It is objected by the defendant, that this agreement wants consideration. The promise of the plaintiff to charter the vessel furnished ample consideration for the defendant's undertaking. It is a case of mutual promises, and although the obligation of the contract was partly optional as to one party, that is no objection, provided there was a good consideration to uphold the agreement. (*Giles v. Bradley*, 2 *John. Cas.* 253. *Disborough v. Nelson*, 3 *Id.* 81.) The true question arises upon the construction of the agreement set forth in the declaration. The vessel not having arrived on the 10th of December, the plaintiff could not have been held to employ her after that day; and all obligation on his part to the defendant ceased at that time, unless he volunteered to continue it. The vitality of the agreement thenceforth depended upon the exercise of an option reserved to himself. If he had elected to be further bound, and had notified the defendant of his election at a proper

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time, the contract would have become absolute, and binding upon both parties. "The plaintiff had the option of *continuing* the agreement or not." This is the language of the contract, and it seems to negative the idea that there might be a space of time between the 10th of December and the day when the vessel should arrive, during which neither party should be bound. The agreement was to cease after the 10th of December, unless it was *continued* by an exercise of the plaintiff's option. It was for him to carry the agreement forward, and insist upon its obligation from that day forth. It seems to us that his option ought to have been determined on the 11th of December.

There are cases, as suggested by the learned counsel for the plaintiff, where a similar option may be exercised within a reasonable time, and what that is may be a question of fact for the jury. But such a question can never arise where the agreement itself can be fairly construed to settle the time at which the option is to be determined. It then becomes a question of law for the court.

There must be judgment for the defendant on the demurrer, with leave to the plaintiff to amend on payment of costs.

SAME TERM. *Before the same Justices.*

VREELAND vs. BLUNT and TOMPKINS.

Where a fund was raised by T. by a loan from G., and was placed in the hands of B. to answer certain specified purposes, among which was the payment of a certain sum to S., and T. thereupon drew a draft upon B., in favor of S., in these words, "Please pay to N. W. S. or order, \$7000 *out of the money you receive from F. G. for me*, in the following manner, \$500 when," &c.; and the draft was accepted by B. as follows, "Accepted, payable when in funds, under the contract;" *Held*, that the draft was payable out of the particular fund mentioned, which was to be regarded as equitably appropriated for that purpose. *Held also*, that after the recovery of a judgment by S. against T., for the amount.

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due from the latter to the former, on the draft, and the return of an execution unsatisfied, a bill would lie against T. and B. to compel B. to apply so much of the fund in his hands as should be necessary to satisfy such judgment, with interest and costs.

IN EQUITY. This was an appeal by the plaintiff from a decree of the late assistant vice chancellor of the first circuit. The bill was a creditor's bill, filed to obtain satisfaction of a judgment obtained by one Nathaniel W. Smith, in May, 1845, against the defendant Tompkins for \$1004.30, which judgment had been assigned to the plaintiff. The defendant Blunt was made a party to the bill under the following circumstances. A Mr. Burtnett, the owner of certain lots in the city of New-York, made a contract with the defendant Tompkins, to erect seven houses thereon, and the latter agreed with Nathaniel W. Smith to pay him \$7000 for superintending the mason work, and furnishing materials for part, by a draft on the defendant Blunt, payable in instalments as the work advanced. Francis Griffin had agreed to advance to Mr. Burtnett the sum of \$14,000 as a loan, in instalments payable as the buildings went on. Burtnett, on the 26th of December, 1843, assigned his interest in this agreement to Tompkins, who, on the same day, assigned it to Blunt. Tompkins, for the purpose of paying Smith the \$7000 which he had agreed to pay him for superintending the mason work of the buildings, &c. on the 9th of January, 1844, gave to him a draft upon Blunt, in these words:

"MR. JOSEPH BLUNT,

Sir: Please pay to Mr. Nathaniel W. Smith, or order, seven thousand dollars *out of the money you receive from Francis Griffin, for me*, in the following manner:

\$500 *when* the 2 tier of beams is on and the brick work is up as high.

400 *when* third tier is on, and brick work up.

400 *when* fourth tier is on and brick work up.

800 *when* the roof is on.

800 *when* scratched and yards regulated.

800 *when* browned.

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1200 when hard finished, and doors hung.

2100 when the buildings is finished.

And oblige yours,

GEORGE C. TOMPKINS."

This draft was accepted by Blunt as follows: "Accepted, payable when in funds under the contract." For part of the money due on this draft the judgment in question was given. It was admitted that Blunt had received from Griffin, under the contract between Burnett and Griffin, the sum of \$5000, since the acceptance of the draft; all of which he claimed had been paid out, under drafts drawn upon him by Tompkins, except the sum of \$1200, which Blunt admitted he had in his hands at the commencement of this suit. A former bill was filed by Smith against the defendants in this suit, to prevent the assignment, by Blunt, of the contract, which he alledged he held in trust for the workmen on the buildings. That suit was still pending and undetermined, at the time of filing the bill in this cause. And the defendant Blunt insisted, by his answer, that such former suit was a bar to the present. After the assignment to the plaintiff of the judgment recovered by Smith against Tompkins, the plaintiff gave to Blunt the following notice:

"Sir: Take notice, that you are hereby required to pay me the amount of a judgment recovered in the court of common pleas of the city and county of New-York, in the name of Nathaniel W. Smith *vs.* George C. Tompkins, and docketed on the twenty-ninth day of May, A. D. 1845, for one thousand and four dollars and thirty cents. This judgment was assigned to me for a debt then due, and owing, by deed of assignment executed on the eighteenth day of October, 1845, and bearing date that day. If a judgment creditor's bill were filed by me against George C. Tompkins, you, on being made a party thereto, would be directed to pay to me the amount of that judgment out of any moneys you might have in your hands belonging to said Tompkins, if there were no other ground for the bill than the mere fact of holding that amount in your hands, or being a debtor to him in respect thereof; but you will bear in mind, that in your answer to the bill filed by Nathaniel W. Smith

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against George C. Tompkins, and yourself, for the payment of the amount due from Tompkins, you expressly state that the contract between Tompkins and Burtnett, and the moneys receivable thereunder, were assigned to you for the purpose of paying the master mason, &c. and of meeting the acceptances you had come under, and that said Tompkins 'has agreed that of the moneys now accepted for this defendant should retain twelve hundred dollars, to meet the amount of any recovery which might be had against him by the said Smith.' This recovery now being had, should you decline or neglect to pay me the amount of this judgment, with interest thereon, I shall be compelled to make you a party to the creditor's bill I may file against said Tompkins, and not only ask in that bill the payment of this amount, but that you be directed to pay the costs occasioned by your refusal or neglect to pay what you have by your answer alone bound yourself to pay. I trust you will save myself this trouble and yourself this expense.

Dated New-York, October 20, 1845.

Yours, &c.

JACOB M. VREELAND."

JOSEPH BLUNT, Esq.

The defendant Tompkins suffered the bill to be taken as confessed against him. The cause was heard upon pleadings and proofs as to the defendant Blunt. The assistant vice chancellor made a decree dismissing the plaintiff's bill as to the defendant Blunt, with costs, and granting the usual relief as to the defendant Tompkins.

S. Jones Mumford, for the appellant.

C. A. Rapallo, for the respondent.

By the Court, HURLBUT, J. The objection based on the pendency of another suit instituted by Smith for the same cause of complaint, ought not to prevail. The present bill is more comprehensive, and embraces more completely the whole subject in dispute, than the bill preferred by Smith. No decree

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has been made in that suit, and upon a proper application it may be dismissed on such terms as will protect the rights of all the parties concerned.

The objection that the plaintiff had a complete remedy at law was not taken in the answer. But if it had been, it could not have availed the defendant; for whether the plaintiff stands in the position of a judgment creditor pursuing the assets of his debtor by the ordinary creditor's bill; or claims the specific application of the fund in the hands of Mr. Blunt, to the payment of his judgment, by reason of an alledged equitable assignment in his favor, he is equally entitled to come into a court of equity for relief.

The plaintiff has succeeded to all the rights of Smith, in whose favor Tompkins directed the defendant Blunt to pay the claim in controversy out of moneys he should receive for Tompkins from Francis Griffin. Mr. Blunt agreed to pay when he should receive the funds from Griffin. He was put in funds by the latter before the commencement of this suit, and admits that at that time he had \$1200 in his hands.

The decree from which this appeal was taken, was based in part on the idea that the draft and acceptance did not amount to an equitable assignment of the funds in the hands of Mr. Blunt, because, as the assistant vice chancellor thought, it was simply a bill of exchange payable at large and not out of any particular fund. But it is very clearly otherwise. The draft directed Mr. Blunt to pay out of the moneys he should receive for the drawee, from Francis Griffin. A fund was raised by the drawee, by the aid of Griffin, and placed in the hands of Mr. Blunt, to answer certain specified purposes, among which was this payment of Smith's claim. The fund thus raised was of a specified amount; it was identified as coming from a particular source; and it was appropriated to a specific object. The holder of the fund had no interest in it—he was bound to apply it as directed by the owner—and he accepted the draft of the latter as payable specifically out of this fund. It seems clear that the draft was payable out of this particular fund, which must be regarded as equitably appropriated for that purpose.

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(See *Morton v. Naylor*, 1 *Hill*, 583; *Bradley v. Root et al.* 5 *Paige*, 632; *Yeates v. Groves*, 1 *Vesey, jun.* 280.) As to the objection that the plaintiff has not proved the amount which was due Smith on the draft, it may be observed, that Mr. Blunt was not interested in the performance of the contract between Smith and Tompkins; and if the latter chose to waive its performance in part, and to release Smith from the fulfilment of a condition on which the draft was originally made payable, it is not competent for Mr. Blunt to object. The plaintiff's claim is established by a judgment against Tompkins. He is the principal debtor, whose liability is fixed and determined, and Mr. Blunt, as the naked holder of the fund, bound by agreement to apply it for the plaintiff's benefit, can not alledge that which his principal is precluded from urging, against the application of the fund to the payment of the judgment.

So much of the decree of the assistant vice chancellor as was appealed from, must be reversed with costs, and a decree must be entered declaring the plaintiff entitled to be paid the amount of his judgment with interest and costs of this suit, and of this appeal, out of the funds in the hands of Mr. Blunt, as admitted in this suit, upon which interest must be charged from October 20, 1845, the day when the plaintiff demanded to have the moneys applied to the satisfaction of his judgment.

SAME TERM. *Before the same Justices.*

LITCHFIELD and others vs. PELTON and others.

C. M. P., a debtor in failing circumstances, made a sweeping sale and transfer of all his property, real and personal, to his brother G. P. P., a young man without family, experience, or property resources, who was in his employment as clerk, for the sum of \$20,000 payable in one year with interest, taking from him his individual notes for that amount, not endorsed, guarantied or secured.

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On the same day, C. M. P. made an assignment of those notes to B. in trust for the benefit of his creditors, giving preferences; *Held* that the sale from C. M. P. to his brother, and the assignment of the securities to B. were to be regarded as one transaction; and that the circumstances afforded sufficient evidence of a fraudulent intent to justify an injunction and receiver.

A general denial of fraud by a defendant, can not be urged successfully against an order for an injunction, where facts are admitted from which the court, or a jury, may properly infer a fraudulent intent.

The injunction, in such a case, should be retained until final judgment.

THIS was an appeal by the defendants from an order made at a special term of this court, denying a motion on the part of the defendants, to dissolve an injunction, and granting the plaintiffs' motion for a receiver. The complaint was filed by the plaintiffs as judgment creditors of Charles M. Pelton, against the said Charles M. Pelton, George P. Pelton and William H. Bradley, to set aside a sale made by Charles M. Pelton, to George P. Pelton, of all his property, and an assignment made by him to Bradley, of the securities taken from George P. Pelton on such sale, for the benefit of certain specified creditors of the assignor. The facts are stated in the opinion of the court.

C. Tracy, for the plaintiffs.

Varick & Eldridge, for the defendants.

By the Court, HURLBUT, J. It is very evident that the sale from Charles M. Pelton to his brother, and the assignment of the former to Bradley, are to be regarded as one transaction, in which the Peltons, together with the creditors preferred by the 2d and 3d articles of the assignment, and the assignee Bradley, must be considered as having acted together for the attainment of the same end. Charles M. Pelton was embarrassed and pressed with suits by his creditors. An action of the plaintiffs was running against him, and required but a week to be determined by a judgment. He was unable to pay his debts not for the present only, but after realizing the full value of all his assets. He was believed to be insolvent, as well by himself as by the confidential creditors, under whose advice and for whose

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benefit in part, he acted. Under these circumstances he made a sweeping sale and transfer of all his property, real and personal—of debts due him, which for aught that appears might have been speedily collected—and of his stock and manufactured goods, a portion of which would probably have commanded full price, on a cash sale in the proper market. And this general transfer of his estate was made to his brother George P. Pelton, a young man without family, experience or property resources, who was in his employment as clerk, and who, in consideration of the alleged sale contracted to pay Charles M. Pelton \$20,000 with interest, at the expiration of a year. This was followed on the same day, by the assignment of Charles M. Pelton to Bradley, of the securities given on the sale, for the benefit of creditors, giving preferences.

It is urged in defence of these transactions, that George P. Pelton was honest and trustworthy, and that he agreed to pay the full value of the estate conveyed to him by his brother. This may be true; but still he was an irresponsible purchaser upon credit, and without security, and did not enter into the arrangement in the ordinary course of business, nor with the motives of a *bona fide* purchaser. The intention of all concerned appears to have been to make such a disposition of the entire estate of an insolvent debtor, as that it could not be sold to satisfy pressing judgments; and that it should be so secured in friendly hands, as not only to avoid all risk of sacrifice at the instance of diligent creditors, but also be in a condition to be availed of for the benefit of Charles M. Pelton and his indulgent creditors.

If the design had been simply to transfer the estate for the sole benefit of creditors, there was a direct means of doing this, without the intervention of a prior sale to George P. Pelton. A full price nominally agreed to be paid by an honest but wholly irresponsible young man, can not help this transaction.

It was urged by the defendants' counsel, that the advice and consent of the principal creditors ought to be regarded as helping the sale and assignment in question. We think not, under the circumstances of this case; they being preferred creditors. If

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they were here seeking to avoid what they had once deliberately sanctioned, their former consent might very properly be alleged against them; but the creditors who were pursuing the fund in question when it was transferred, and who have not consented to the assignment, can not be prejudiced by the acts or acquiescence of others.

It was also urged that all fraudulent intent being denied by the defendants there was virtually a denial of the whole equity of the complaint, and that for this reason the injunction ought to be dissolved. But, from the conceded facts in this case a jury might very well find that the transaction in question was made with intent to hinder and delay creditors; and if, as a court, we were required to determine upon the question of intent as one of fact, we should have very little hesitation in arriving at the same conclusion. A general denial of fraud can not be urged successfully against the order for an injunction, where facts are admitted from which the court or a jury may properly infer a fraudulent intent. The injunction in such a case should be retained until final judgment.

The order of the special term, denying the motion to dissolve the injunction, must be affirmed with costs.

SAME TERM. *Before the same Justices.*

ROOSEVELT and others vs. CAROW and others.

What constitutes a valid delivery of a deed.

Where a deed from a father, to trustees, in trust for his daughter, was signed and sealed by the grantor in the presence of witnesses, but the attesting clause did not state that it was *delivered*; and the grantor retained the same in his possession nearly four years after its execution, and until the time of his death, without disclosing its existence either to the trustees or to his daughter, the cestui que trust; in the mean time treating the property as his own, and altering his will so as to increase a previous devise to his daughter to an amount nearly double the value of the property conveyed; and after his death the deed

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was found in a bureau belonging to the grantor, among his clothes, and was then proved by one of the subscribing witnesses, and recorded; *Held* that such deed was void and inoperative as a deed of bargain and sale, for want of a valid delivery.

Held also, that such deed was not valid or operative as a voluntary settlement.

A voluntary settlement, fairly made, is always binding in equity, on the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed. And even if he retains it, the weight of authority is in favor of its validity, unless there be circumstances besides the mere fact of his retaining it, to show that it was not intended to be absolute.

Per EDMONDS, J.

IN EQUITY. This was an appeal, by the plaintiffs, from a decree of the Hon. A. L. ROBERTSON, late assistant vice chancellor of the first circuit. James I. Roosevelt, being a man of large estate in the city of New-York, and having one daughter, married to the defendant Michael Burke, on the 30th of April, 1833, bought a house and lot in that city, in the vicinity of his own residence, taking the title to himself. He also repaired and furnished it, and permitted his daughter to occupy it as tenant at will, under him. After occupying it a few months she abandoned it. Afterwards, and on the 9th of January, 1834, Roosevelt (the father) executed a letter of license which recited that he was the owner of the house and furniture which had cost him \$10,987, and that he was desirous of providing a suitable residence for his daughter, free from the control or debts of her husband, and declared that in consideration of the premises he granted and allowed her to enter upon and occupy the house and furniture during his pleasure, but not to extend beyond his life or hers; and it was provided that nothing therein contained should divest the father of the possession of the house and furniture, and that the interest on the above sum, and the deterioration of the house and furniture, and all future advances for her, should be charged to her as a debt, and be deducted from her portion of his estate after his decease. This instrument, formally sealed and executed, was approved by the daughter and delivered to her. By virtue of it she, on the day of its date, again went into the occupation of the house, and (with an intermission of a year, during which she and her husband took board,) contin-

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ued to occupy it until her death on the 12th of Feb. 1844. At the time of purchasing the house in 1833, Roosevelt had made his will, in which he devised to his daughter \$40,000. On the 11th of February, 1837, he made another will revoking former ones, in which he devised to his daughter \$60,000. He died in August, 1840. After his death, a paper was found by one of his distant relatives, among his clothes, in the drawer of a bureau in which he was not in the habit of keeping his papers, which was in the following words :

“ In consideration of one dollar to me in hand paid, I do hereby assign and convey in trust to Cornelius V. S. Roosevelt, James I. Roosevelt junior, Peter Augustus Jay, and Isaac Carow, my house and lot of ground with the furniture therein, known as house No. 116 in Greenwich-street, next door to the corner of Carlisle-street in the city of New-York, containing about twenty-three feet front and rear and about fifty-four feet deep, to have and to hold the same for the use and support of my daughter Catharine Angelica and also her children, with full power to them my said trustees, or a majority of them, to sell and convey the same and convert the proceeds into such other funds as they may deem most advisable for the purposes aforesaid. In witness whereof I have hereunto set my hand and seal this second day of November, 1836.

Signed and sealed in presence of us,

R. G. Palmer, Lewis McMullen.

JAMES I. ROOSEVELT.” [L. s.]

(The following was attached to it after the grantor's death :)

“ City and county of New-York, ss. : On this 28th day of September, 1840, before me personally appeared R. G. Palmer, satisfactorily proved to me to be the subscribing witness to the foregoing instrument by the oath of William H. Roosevelt, who being duly sworn says that he knows him to be such person, and that he resides in the city of New-York ; and the said R. G. Palmer being duly sworn, says that he is acquainted with James I. Roosevelt, knows him to be the same individual described in and who executed the foregoing instrument—that he saw him execute the same, and that he acknowledged

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that he executed the same for the uses and purposes therein mentioned ; and that he the said witness resides in the city of New-York, and that he is a subscribing witness thereto.

W. R. BEEBE, Comm'r of deeds," &c.

"Recorded in the office of register of the city and county of New-York, in liber 406 of Con's, page 633, September 28, at 40 min. past 1 P. M."

This paper, dropped on the floor from among the clothing of Mr. Roosevelt, as the person above mentioned was removing them from the drawer, was picked up by her and laid upon the mantel-piece, where it remained unnoticed for several days, until a younger brother, Wm. H. Roosevelt, accidentally found it there, took possession of it and delivered it to Mrs. Burke. He took it to a commissioner of deeds and had it proved by one of the subscribing witnesses, and then left it in the register's office to be recorded. Neither of the subscribing witnesses knew the nature of the paper which they had thus attested, nor was the existence of the paper known to any one but the father until it was thus accidentally discovered ; except that W. H. Roosevelt had seen it among his father's clothes in the drawer of the bureau about two years before his father's death. The whole of the paper, except the signatures of the witnesses, was in the hand-writing of the grantor ; but the fact that it had been executed by him was not disclosed by him to either of the grantees named in it. Three of the grantees were the same persons who were afterwards named by him as executors of his will and trustees for the \$60,000 which he had given by his will to his daughter and her children, two of them being his sons and residuary devisees. The daughter left her surviving, her husband and two children. The bill in this cause was filed by the residuary devisees against Michael Burke and his two infant children, and Isaac Carow, to have the paper of November, 1836, given up and cancelled and declared void ; the husband and his children continuing to occupy the house and furniture, and claiming to own it under that paper.

On the part of the defendants it was given in evidence that in March, 1840, Mrs. Burke requested her father to purchase a

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house in Walker-street for her, instead of that in Greenwich-street, and he declined, saying he wished her to remain in Greenwich-street, as he had bought a house for her there and he did not like to make out any more papers. He wished her to remain there and have the house repaired; and after that he made extensive repairs on it, at a cost of at least \$1000. It was also proved that Mr. Roosevelt had frequently said he had bought the house for his daughter and intended it as a permanent residence for her.

The assistant vice chancellor made a decree establishing the deed of the 2d of November, 1836; and declaring that on the death of Mrs. Burke the premises therein mentioned passed to her children, the infant defendants, in equal proportions, and directing a reference to inquire whether it was for the interest of the infants that the same should be sold, &c.

J. I. Roosevelt, for the appellants.

C. O'Connor, for the respondents.

By the Court, EDMONDS, J. The first question that arises, in this case, is whether the deed of November, 1836, was so executed and delivered as to have become operative. It is essential to the validity of a deed of land that it be delivered. But what it is that constitutes a delivery is frequently a difficult question to determine. Sometimes a delivery will be presumed from the facts that the deed was proved or acknowledged, and recorded. It was so presumed in *Elsey v. Metcalf*, (1 Denio, 324.) But in *Stilwell v. Hubbard*, (20 Wend. 44,) in *Maynard v. Maynard*, (10 Mass. Rep. 456, and 3 Metc. 275,) in *Jackson v. Phipps*, (12 John. 418,) and in *Naldred v. Gilham*, (1 P. Wms. 577,) it was held otherwise; because there was other evidence of an intention that it should not operate. Sometimes a delivery may be inferred from the grantee's holding possession of the premises granted consistently with the character of the grant; but not when that holding is equally consistent with another and a different grant. (*Jackson v. Phipps*, 12 John. 418.) Sometimes it may be inferred from the grantee's having

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possession of the deed ; but not where such possession can not fairly be presumed to be with the assent of the grantor. (*Carver v. Jackson*, 4 *Peters*, 22. *Uniacke v. Giles*, 2 *Moll.* 257.)

A delivery of a deed, to be valid, is such an act of the grantor touching its execution as deprives him of the power of controlling its operation, and confers on the grantee the right to enforce it, even against the will and pleasure of the grantor. It need not be delivered to the grantee : it may be delivered to a stranger, for his use ; (*Doe v. Knight*, 5 *B. & C.* 671 ;) even though the grantee do not know of its existence until after the grantor's death. Nor need it remain in the possession of the stranger or of the grantee. It will be valid, if it remain in the hands of the grantor ; provided it be signed, sealed and declared by the grantor, in the presence of the attesting witnesses, to be delivered as his deed, and provided there be nothing to qualify the delivery. (*Souverbeye v. Arden*, 1 *John. Ch. Rep.* 240. *Doe v. Knight*, 5 *B. & C.* 671.) But the test is, can the grantee at any time and in any way get possession of it ? Can he enforce it, even against the will of the grantor ? Did the grantor intend that at all events, and immediately, it should operate ? And could the grantee have filed a bill to take the instrument into safe custody ? (*Stilwell v. Hubbard*, 20 *Wend.* 44. *Uniacke v. Giles*, 2 *Molloy*, 257.) Was there nothing to qualify the delivery but the grantor's keeping possession ? nothing else to show that he did not intend it to operate ? (*Scrugham v. Wood*, 15 *Wend.* 546. *Souverbeye v. Arden*, 1 *John. Ch. R.* 256. *Brinckerhoof v. Lawrence*, 2 *Sandf. Ch. R.* 406.)

Recollecting that the deed in question is a conveyance of land, and that seizin, once out of the grantor, can not be revested by a mere destruction of the conveyance, or by any act short of a seizin again, or some solemn act substituted for it, and applying to it these tests, we are irresistibly led to the conclusion that this deed was never delivered.

It was barely signed and sealed by the grantor in the presence of witnesses, and even in that act, he, well acquainted with the forms of conveyancing, was careful to leave out of the attesting clause, the usual words to signify that it was "delivered"

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also. From that time till his death, a period of near four years, he retained the instrument in his own possession, never disclosing its existence either to the grantees named in it or to the persons beneficially interested; and in the mean time he acted toward the property as if it was his own, paying taxes and expending money for repairs, and altered his last will, increasing the devise to his daughter to an amount nearly double the value of the property in question. There is nothing in all this tending in any manner to show that the grantees named in the instrument, or the cestuis que trust, could have obtained possession of it—could have enforced it against his will, or could have filed a bill to have taken it out of his possession; or to show that it should operate absolutely. The facts which are invoked in aid of a different construction, viz. his refusal to change the house, and his declaration that he had bought it as a permanent residence for his daughter, are just as consistent with the continuance of the license, as with the character of this paper; and there is nothing from which we can justly infer an intention to deliver, except his signing and sealing. And those acts are just as consistent with an intention that it should not operate in case he altered his will, (as he afterwards did,) as with an intention that it should operate absolutely. A court of equity will disregard a deed as an imperfect instrument, if it be voluntary and never parted with, and executed for a special purpose never acted on, and without the knowledge of the grantee. (*Cecil v. Butcher*, 2 Jac. & Walk. 573.)

This deed was not delivered until after the death of the grantor, and was therefore inoperative. (*Jackson v. Leek*, 12 Wend. 107.) It was kept possession of by him, and there is nothing to show an intention that it should operate *in presenti*; and therefore was inoperative. (*Stilwell v. Hubbard*, 20 Wend. 44.) There was no acceptance by the grantee, which is also essential to a valid delivery. (*Jackson v. Phipps*, 12 John. 418.) And although an acceptance will be presumed from the beneficial nature of the transaction, where the grant is absolute, yet such presumption is not indulged where the grantee derives no benefit, but is subjected to a duty or the performance of a mere

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trust. (*Jackson v. Bodle*, 20 John. 185.) And there are several circumstances, besides the mere retention of the deed by the grantor, to qualify the delivery. (*Doe v. Knight*, 5 B. & C. 571.)

Under these circumstances it is impossible for us to hold that this instrument was duly delivered and operative as a deed of bargain and sale.

It remains to inquire whether it may not be operative as a voluntary settlement. It was not a gift *inter vivos*; for such gifts have no reference to the future, but go into immediate and absolute effect; and there was no delivery, either actual or symbolical, *secundum subjectam materiam*. It was not a gift *causa mortis*; for it was not conditional, like legacies, was not made in contemplation and expectation of death, and there was no delivery, as before mentioned.

If good at all, it was so as a voluntary settlement, which if perfect, will be executed after the death of the grantor; because, between the executor and donee, there is no preferable equity. But then it must have been so final that the party claiming under it could, during the assignor's life, have filed a bill to take it into safe custody. (*Uniacke v. Giles*, *supra*.) The possession of the instrument must have been obtained by the grantee with the assent of the grantor, and not clandestinely. (*Naldred v. Gilham*, 1 P. Wms. 577.) To allow force to this deed, will be to give the daughter a double portion, which is not encouraged, unless it is clear that such was the intention. (*Johnson v. Smith*, 1 Ves. sen. 316.) There are acts here, viz. the keeping the deed in his possession, concealing the knowledge of its existence, and increasing the daughter's portion by a will subsequently made—which denote an intention contrary to that appearing on the face of the instrument. (*Bunu v. Winthrop*, 1 John. Ch. R. 336.)

A voluntary settlement fairly made is always binding, in equity, on the grantor, unless there be clear and decisive proof that he never parted nor intended to part with the possession of the deed; and even if he retains it, the weight of authority is in favor of its validity, unless there be circumstances besides

Roosevelt v. Carow.

the mere fact of his retaining it, to show it was not intended to be absolute. (*Souverbeye v. Arden*, 1 *John. Ch. Rep.* 256.) *Naldred v. Gilham*, *supra*, was a case of that kind. In *Cotton v. King*, (2 *P. Wms.* 358,) the deed of settlement was put into the hands of the grantor's agent with strict charge not to part with it, and no other person was privy to the transaction, and the settlement was held not to be binding. *Clavering v. Clavering*, (2 *Vern.* 473;) *Boughton v. Boughton*, (1 *Atk.* 625;) *Johnson v. Smith*, (1 *Ven. sen.* 314,) and *Brinckerhoof v. Lawrence*, (2 *Sandf. Ch. Rep.* 400,) were all cases in which the settlements were held to be good, although the grantor had retained possession of the deed; but they were cases in which there were no circumstances besides such retention to show that the deeds were not intended to be absolute. (5 *Barn. & Cress.* 571.)

Now in this case, there is something besides the retention of the deed, to show the intention of the grantor. The silence which he maintained in regard to it, and which in the case of *Cotton v. King* was controlling—his acts towards the property, and his subsequent will—are all circumstances going to show his intention, or at least showing that he had no intention it should at all events be absolute, or be so in any contingency which afterwards happened.

This instrument, then, whether it be regarded as a deed of bargain and sale, or as a voluntary settlement, or in its relation to real or personal estate, has only one element of vitality—it was signed and sealed. It was never delivered; for the delivery after death is nothing. (*Jackson v. Leek*, 12 *Wend.* 107.) Nor is there any satisfactory evidence that it was intended to operate at the grantor's death. And it can not be sustained.

The decree of the assistant vice chancellor must be reversed, and the instrument decreed to be delivered up and cancelled.

Decree accordingly.

KINGS GENERAL TERM, March, 1849. *McCoun, Morse,
and Barculo*, Justices.

SISSON *vs.* C. D. BARRETT, impleaded with E. L. BARRETT.

Where a party signed a note as a surety for the first signer, and subsequently a third person signed it, adding to his signature the word "surety;" *Held*, in an action by the third signer of the note, against the second, to recover a sum amounting to half of the note, which he had paid to the holder, that the addition of the word "surety" to the plaintiff's name did not materially affect the rights of the parties; that it did not constitute the plaintiff a surety as to both of the previous signers, but only a co-surety with the second, for the first signer; and that, in the absence of any thing beyond the face of the paper tending to establish any other relationship between them than that of co-sureties, the plaintiff could not recover.

MOTION for judgment upon a special verdict. The action was *assumpsit*. The plaintiff declared upon the money counts, and gave notice that he would give in evidence a note upon which he had paid moneys as surety for the defendant, *viz.* the sum of \$1122,50 and interest from the 1st day of October, 1847. The note was as follows:

"\$2000. For value received, we jointly and severally promise to pay Wm. Davis, his heirs or assigns, two thousand dollars one year from date at seven per cent interest. Poughkeepsie, January, 1st, 1842.

E. L. BARRETT.

C. D. BARRETT.

JACOB SISSON, Surety."

The defendant Caleb D. Barrett pleaded the general issue. The cause was tried at the Dutchess circuit in December, 1848, before Justice BARCULO. Whereupon the jury found a special verdict as follows, to wit. 1. That the several signatures to the note were in the proper hand-writing of the defendants respectively. 2. That Jacob Sisson paid to the holder of the note, upon his request, the sum of \$1122,50 on the 1st of October, 1847, and that the amount of his claim against the defendant,

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at the time of the trial, for principal and interest, was \$1215,22, being one-half the note; and that on the same day, but a little time after, Caleb D. Barrett paid to the holder the sum of \$1122,50, being the other half. 3. That the said Caleb D. Barrett was a surety for Edward L. Barrett on the note.

John Thompson, for the plaintiff.

Wm. Eno, for the defendants.

By the Court, BARCULO, J. The note was made for the benefit of Edward L. Barrett the first signer. The jury have found, by the special verdict, that Caleb D. Barrett was a surety for Edward L. Barrett. Sisson, the third signer, added to his signature the word "surety." There is nothing else to show the understanding of the parties, or the circumstances under which their respective signatures were made. The single question then arises, upon this state of facts, whether the legal effect of the word "surety," added to the plaintiff's name, constitutes him a surety, as to *both* of the previous signers, or a *co-surety* with Caleb for the real principal.

We have come to the conclusion that this addition of "surety" does not materially affect the rights of the parties. This seems to follow from the established doctrine that the question of suretyship is a question of fact open to parol proof; and although all the signers may be liable to a bona fide holder of the paper, their rights as between each other, may be varied by extrinsic evidence. Although, therefore, this addition would as a *matter of evidence*, establish the fact that the plaintiff was a surety, it can not, by any means, preclude any other signer from proving the same fact in regard to himself, in the ordinary way; and when the fact is thus found by the jury, the two sureties stand upon the same footing. The effect of the plaintiff's precaution in this cause, is to dispense with the necessity of proving *aliunde* the fact of his being surety. Caleb Barrett not having taken the same precaution, was compelled to resort to his proof before a jury. The verdict has annexed the word

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surety to his name, and the two stand now on the footing of *co-sureties*. We do not mean to say that the plaintiff could not have guarded himself against his liability as a co-surety by adding to his signature an express declaration that he signed as surety for all the previous signers, as was done in *Harris v. Warner*, (13 *Wend.* 400;) nor that he might not have recovered against Caleb Barrett by showing a state of facts by which it should appear positively, or by legal intendment, that he intended, as to the plaintiff, to stand in the character of principal, according to the case of *Warner v. Price*, (3 *Wend.* 397.) But the present case does not come within either of the principles adverted to. It presents a bare struggle between two sureties, in which one seeks to charge the other with the whole payment, without showing any thing, beyond the face of the paper, that tends to establish any other relationship between them than that of co-sureties. We think he can not recover.

Judgment for defendant.

SAME TERM. *Before the same Justices.*

LIVINGSTON vs. RADCLIFF and others.

An attorney, under his general authority to collect a note, is authorized to receive a payment of part in money and the residue in a note for a short period of a person of undoubted responsibility.

Where one of several makers of a note makes an arrangement with the other makers, or some of them, by which provision is made for the payment of such note, and the means are put into his hands for that purpose, and in consequence thereof he takes it up, paying a part of the amount in cash and giving his individual note for the balance, which the holder accepts in payment of the first note, and thereupon gives up the original note, the consideration is clear and sufficient, and the makers of the original note are thereby discharged.

Where the circumstances of the transaction show that a debtor, discharged by

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the acceptance of another security, has, by reason of the arrangement, put himself into a position where he may, or must, be prejudiced if held liable for the debt, this constitutes a legal consideration for the creditor's discharging him. The decisions in *Cole v. Sackett*, (1 *Hill*, 516,) and *Waydell v. Luer*, (5 *Id.* 448,) considered, and disapproved.

THIS was an action of assumpsit, brought by the plaintiff to recover the amount of a promissory note for \$1000 and interest, given by the defendant Radcliff and four others. The declaration contained the usual money counts and an account stated, with a special count against two of the makers, Platt and Delamater, who had affixed to their names the word "security," with a notice subjoined that a promissory note of which a copy was also subjoined, would be given in evidence for the plaintiff, on the trial, under the money counts and the special count. The defendant Radcliff alone appeared. He pleaded the general issue. The cause was tried before Justice Barculo at the Dutchess circuit in October, 1848. By consent of the parties it was tried by the judge without a jury. The plaintiff proved the signatures of the makers, to the note. The declaration was not served upon Platt and Delamater. The defendant introduced J. C. McCarty as a witness, who testified that he was the law partner of the plaintiff's attorney; that the note in question was left in their office for prosecution, by G. Van Kuren, the plaintiff's agent; that prosecution was delayed at the suggestion of the defendant; that Platt, one of the makers, said the note would be arranged, and that on the 13th of June, 1848, he paid to the witness \$490, and drew his individual note for \$600; that the witness at first objected to taking Platt's note; that Platt wanted him to take his note for 2 or 3 days, saying that if Van Kuren was not satisfied, he, Platt, would give witness the money for it; that witness then gave up to Platt the note in suit; that he met Van Kuren the same afternoon and told him what he had done, but he made no reply; that a day or two afterwards Platt came to the office and asked the witness for his note and money, and the witness returned the same to him, and took back the note in suit; that the whole arrangement with Platt was conditional; that it was one transaction,

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and was subject to Van Kuren's approval. This witness also testified that Platt was responsible, and *in good credit*. The plaintiff's attorney testified that on being informed by McCarty of the taking of Platt's note, he went immediately and saw Van Kuren, and told him what had been done; that Van Kuren said he did not assent to it, that he wanted the money, and would not take any man's note; that the witness then called upon Platt and told him Van Kuren would not assent to the arrangement that he had made with McCarty, and that he must pay the money on the note; that Platt thereupon returned the note now in suit, and took his own note and the money. Van Kuren testified that Edward Pultz, one of the makers, applied to him, as the plaintiff's agent, for a loan of the money upon the note in question; that Pultz and P. E. Radcliff, another of the makers, were partners; that the witness received the note from Platt and paid him a check in favor of Pultz for \$700, and the balance in money; that he, Van Kuren, did not assent to the arrangement of Platt with McCarty; that he did not want any further notes, but wanted the money. The evidence being closed, the court rendered a judgment for the defendant, with costs; and the plaintiff, upon a case, moved for a new trial.

A. Wager, for the plaintiff. I. There was no payment made by Platt the surety; as the arrangement he made with McCarty was conditional, wanting Van Kuren's approval, which was refused; and McCarty had no authority to accept a note in payment. II. No payment can be made unless there be an acceptance by the payee, or some one in his behalf. III. It appears from the testimony that the whole arrangement with Platt was one transaction, subject to Van Kuren's approval. IV. Van Kuren refused to accept Platt's note, and Platt refused to pay the money, which rendered that transaction with McCarty of no effect, it not being consummated. V. The note of Platt not having been accepted by Van Kuren, could not have been enforced, being without consideration in the hands of any one but the plaintiff. VI. The note upon which this action is brought having been handed to Platt only upon conditions, which con-

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ditions were not fulfilled, has not lost its vitality against the makers, and the money and note of Platt having been returned, there has been no legal or equitable change in the liability of the defendant. VII. The defendant had given his note with Peter E. Radcliff, to Platt, to have it discounted, and with the proceeds to take up this note which P. E. Radcliff destroyed after the arrangement with McCarty. VIII. The verdict was contrary to evidence.

J. Armstrong, for the defendants. I. McCarty, Wager's law partner, had the same authority to receive payment of the note in question that Wager himself had; and his acts must conclude their client, as much as the acts of Wager would have done. The attorney has a large and liberal discretion. The act here attempted to be repudiated worked no injury, and under some circumstances might have been highly beneficial to the plaintiff. It came therefore within the scope of his authority. II. The payment by Platt of \$490 in cash, and McCarty's acceptance thereof, and of Platt's individual note for the balance, the original note being given up at the time, must have been understood by both to be a payment of the latter. The only condition of which McCarty speaks was, that if Van Kuren would not consent to give time on Platt's individual note, he, Platt, was to pay the money—not that the entire transaction should be rescinded. III. McCarty, either the same afternoon or the next, made known to Van Kuren what he had done. Van Kuren made no objection, and therefore must be presumed to have assented to the arrangement. Platt was amply responsible, and Van Kuren could have had no motive for dissenting so far as the plaintiff was concerned. What afterwards passed between him and Wager was not evidence; and if it was, it only proved that he wanted the money for Platt's individual note. And Wager, by demanding it, ratified the arrangement McCarty had made. IV. It was Platt who sought to revoke the arrangement made between him and McCarty. The proposition to return the original note and take back his own and the money he had paid, came from him. He had no right to

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require this to be done, and was liable upon his individual note. V. The arrangement with Platt could not be rescinded without affecting the rights of other parties to the note ; and it was rescinded only at his request and for his convenience. VI. The decision of the judge has the same legal effect as the verdict of a jury would have had, and every conclusion of fact which from the evidence he might have drawn, is to be intended in support of his decision. VII. The payment by Platt of \$490 in cash was a payment of the note *pro tanto* ; and the only question is whether Platt's individual note for the balance was accepted in payment of the original note. This was a question of fact which is settled by the decision of the judge. (*Johnson v. Weed*, 9 *John.* 310.) VIII. The plaintiff's remedy was on Platt's individual note, and unless this proved to be of no value, there was no pretence for resorting to the original note.

By the Court, BARCULO, J. It can hardly be contended that the attorney, under his general authority to collect the note, was not authorized to receive a payment of part in money, and the residue in a note for two or three days of a person of undoubted responsibility.

The authority of the attorney being conceded, it becomes a question whether the evidence establishes the fact of payment. Platt, one of the makers of the note, went to the attorney on the 13th of June, paid \$490, and gave his individual note for \$600, which he requested him to take for two or three days. The attorney received the money and note and gave up the original note. Van Kuren, the plaintiff's agent, who left the note for collection, was informed on the same day of the arrangement, and did not express any dissent. It seems to me that this evidence would fully *authorize*, if not *require*, a jury to find that the original note was paid. Suppose things had remained thus for a year, or even a month, could there be any doubt of the intention of the parties to make this a payment ? And yet length of time could not really make any difference in the character of the transaction. If it was a payment at all, it was so at the instant of its completion.

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But it is contended that this arrangement was conditional, and subject to the approval of Van Kuren; and that, he disapproving, Platt on the 15th rescinded the arrangement and restored things to their former state. As I understand the evidence, the only thing subject to the approval of Van Kuren, was the taking of Platt's note for two or three days; for Platt promised, if Van Kuren was not satisfied with that, he would give the attorney the money for it. This seems to have been the understanding also of the attorneys; for when one of them applied to Platt on the morning of the 15th, he told Platt that Van Kuren would not assent to the arrangement, "and that he must pay the money on his note." Up to this time no one seems to have supposed that Platt had a right to rescind the arrangement and take back his note and money. It was evidently an *after thought*, and probably originated in some difficulty between Platt and the other makers. If the arrangement was conditional, as claimed by the plaintiff, it is extraordinary that the attorney did not keep the original note until the approval of Van Kuren had been obtained.

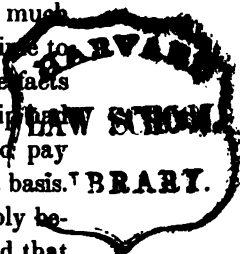
But it is also contended that Platt's note could not operate as a payment, because it was the note of *one of the makers of the former note*, and falls within the cases of *Cole v. Sackett*, (1 *Hill*, 516,) and *Waydell v. Luer*, (5 *Id.* 448.) But in addition to the circumstance that the last of these decisions was reversed by the court of errors, (3 *Denio*, 410,) it never had any application to the case of a liability *created merely by note*. It was applied to the occasion of joint indebtedness arising out of partnership dealings. The supreme court held that the note of one partner, given for a partnership debt, antecedently due, would not extinguish the liability of the other partners. But the reason assigned for that decision is by no means satisfactory. It is said that there is *no consideration* for the discharge of the other debtors, on receiving the note of one. This at first view *appears* to be correct, so far as relates to the *benefit* received by the creditor; although the fallacy of that appearance has been shown by Senator Lott in his opinion delivered on the reversal of the decision in *Waydell v. Luer*. But there is another re-

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spect in which this reason is still more unsound : and that is in respect to the *prejudice* sustained by the discharged debtors.

"A valuable consideration is one that is either a benefit to the party promising, or *some trouble or prejudice* to the party to whom the promise is made." (2 *Kent's Com.* 464.) Hence it follows, that if the debtors claiming to be discharged can show that on the giving of the individual note of one of the joint debtors, in satisfaction of the previous note, they furnished that debtor with funds to pay a portion of the debt, or settled with him upon the basis of his having assumed the whole debt, they are *troubled and prejudiced* by the arrangement, and can hold the creditor to his agreement. Now in the case of *Waydell v. Luer*, it was expressly proven that Waydell took the individual note of Cort and gave up the firm note, knowing of the dissolution of the partnership ; that the other partners credited Cort in his general account with the amount of the note, as so much assumed by him ; and Cort's notes were renewed from time to time for two years, before the suit was brought. These facts warrant the conclusion that the business of the partnership had been closed ; that Cort had been furnished the funds to pay this debt, and settled with by the other partners upon that basis. And yet after a lapse of two years, when Cort had probably become insolvent by the laches of the plaintiff, it was held that there was no consideration for the discharge of the defendants. It seems to me it would have been better to have said to the plaintiff, "You have voluntarily elected to give up the joint security and take the note of an individual. The defendants, acting upon that, have contributed their quotas toward the payment of this debt, by supplying the individual debtor with funds to pay the same. They are therefore in a worse position in consequence of this arrangement : they have been troubled and prejudiced, which constitutes a sufficient consideration for their discharge."

So in the case of *Cole v. Sackett*, the debtor claiming to be discharged, had settled with the other, allowing him for the amount of the debt assumed by him individually, and the creditor took his individual note, and gave up the firm note. At



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that time the partner who assumed the debt was in good credit, but before suit he became insolvent. And in the case of *Arnold v. Camp*, (12 *John*. 409,) it appeared that Camp had given Downing, whose individual note was taken, property for the purpose of taking up the note. It seems to me that in all these cases there was an abundant consideration shown, according to the principles adverted to.

The case before us is one of a similar character. Platt made an arrangement with the other makers, or some of them, and in consequence thereof, he took up the original note and gave his own for a part; and the plaintiff accepted it in payment of the first note, which was given up to Platt. Here a consideration appears in the arrangement made between Platt and Radcliff, by which it seems that the latter had furnished the former a note to be discounted. In other words, provision had been made for the payment of this note; the means were put into Platt's hands; he offered to become, and was accepted by the plaintiff as, the sole debtor. The consideration is clear and sufficient; and the discharge of the defendant, by giving up the old note, is valid and binding.

In all these cases the circumstances of the transaction show that the party discharged has, by reason of the arrangement, put himself into a position where he may or must be prejudiced, if held liable for the debt: and this constitutes a legal consideration for the creditor's discharge of him. Whether indeed, it would not be the duty of the court, in the absence of express proof, to *presume* from the nature of the transaction itself, the existence of a consideration of the character referred to, is a grave question which need not now be discussed.

The motion for a new trial must be denied.

SAME TERM. *Before the same Justices.*

THE PEOPLE, *ex rel.* Post and others, *vs.* THE MAYOR, &c, OF
BROOKLYN.

Legitimate taxation is limited to the imposing of burdens or charges, for a public purpose, equally upon the persons or property within a district known and recognized by law as possessing a local sovereignty for certain purposes; as a state, county, city, town, village, &c.

This rule excludes from the operation of the taxing power all those cases in which the expenses of laying out public squares, and of opening or widening streets, or of other like improvements, are charged upon certain persons or property in consequence of supposed benefits.

It is a fundamental principle, in our government and laws, that individuals are protected in the enjoyment of their property, except so far as it may be taken in one of two ways, viz. as a public tax, upon principles of just equality; or for public use, with a just compensation, ascertained according to the provisions of the constitution. *Per BARCULO, J.*

As money is *property*, the collection of every tax or assessment is taking property, in some mode; and, in order to be legal, must be referable to one of the two modes above mentioned. *Per BARCULO, J.*

An assessment laid by a municipal corporation for the purpose of meeting the expenses of building a public sewer, which expenses are directed to be apportioned, and an assessment thereof to be made among the owners or occupants of the lands and premises benefited thereby, in proportion to the amount of such benefit which each shall be deemed to acquire by such improvement, is not within the scope of the legitimate and constitutional exercise of the *taxing power*, and is illegal and void.

The compensation required by the constitution to be paid whenever private property is taken for public use, does not consist of real or imaginary *benefits*, but can only be made in *money*.

Public improvements in cities and villages can only be paid for by a regular tax, or by voluntary contributions.

CERTIORARI to the mayor and common council of the city of Brooklyn, to remove certain proceedings had and taken by them in constructing a sewer in De Kalb avenue and Raymond-street in Brooklyn, and in assessing the expense thereof, and in confirming the assessment for the same. The respondents, in their return, set forth the various proceedings for the construction of the sewer and the assessment of the expenses, at length.

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Among other things not necessary to refer to, particularly, it appeared from the return that on the 6th of Sept. 1847, a resolution was adopted by the common council declaring that the district of assessment for the sewer in question should include all the property fronting on streets which from their then adopted grade would discharge their surface water into such sewer; and directing the street commissioner to cause the necessary maps and assessment lists to be prepared for the purpose of laying the assessment according to such resolution. On the 26th of June, 1848, the sewer having been completed, an ordinance was passed directing the assessors to apportion the expense thereof, under such directions as should be given by the street commissioner, and one of the city surveyors. And three of the city assessors were designated, to make an apportionment of the estimated expense of said improvement, and to make a just and equitable assessment thereof among the owners or occupants of all the lands and premises benefited thereby, in proportion to the amount of such benefit which each should be deemed to acquire by said improvement. On the 3d of August, 1848, the assessors made their return to the common council of their doings and their assessment lists and maps, with a certificate showing the amounts assessed and for what purposes. The common council thereupon caused a notice to be published, that the assessment list would be presented to the mayor and common council on the 4th of Sept. 1848, for confirmation. Previous to that time, various remonstrances against the proposed improvement were presented. Among these was one signed by the relators and others, stating that they were owners, in fee, of the principal portion of the lands lying north and east of Washington Park, embraced within the proposed district of assessment. That the grades of the streets running through the said lands, as established by the common council, were sufficient to convey all the waters that fell upon the said lands to the Wal-labout Bay, as the said bay then existed. That if, as it was supposed, the government of the United States should hereafter vary the condition of the said bay, a sewer in Flushing avenue which would empty at the same point as the Raymond-street

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sewer would become forthwith necessary, the waters falling upon the lands of the remonstrants would then be conveyed by the grade of the streets to this sewer, and such lands would be assessed for its construction likewise. And they alledged that neither in the then condition of Wallabout Bay, nor in any future condition of the same, could the Raymond-street sewer be made necessary or convenient to their lands. But that in order to afford a plausible pretext for assessing the high lands of the remonstrants for the benefit of those to whom, from the location of their lands, the Raymond-street sewer was material and necessary, it had been proposed to divert the water falling south of Myrtle avenue and east of Washington Park from its natural course to the bay, or to a sewer in Flushing avenue, and to convey it along the southerly sides of Myrtle and Park avenues many hundred feet to the Raymond-street sewer. And the remonstrants insisted that the proposed sewer was entirely unnecessary, and useless to them, and that their property ought not to be assessed for building the same. Some of the other remonstrances alledged that the commissioners had disregarded the ordinance of the common council directing them to assess the expense on the property in proportion as it was benefited by the sewer, and had proceeded to lay out a district to suit themselves, and had assessed upon each lot the same amount, without regard to locality, or the benefit such lot might have received from the sewer; that a large district drained by the sewer had been entirely omitted in their assessment, and other lands from which the water ran over the surface directly to Wallabout Bay were assessed; and other errors and irregularities were pointed out. After these remonstrances were presented, the assessment committee made a report recommending certain alterations in the assessment, and a motion was made to confirm the assessment as amended in such report, but an amendment was offered and adopted that the subject be referred back to the assessors, to report at the next meeting of the board. On the 16th of October, two certificates were presented to the board, by the assessors, on reading which, the assessment was confirmed by the common council. It appeared from the return that on the 12th

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and 16th days of October, when the common council were considering the question of the confirmation of the assessment, A. Crist, Esq. appeared before the board and requested to be heard as counsel for some of the parties interested, and who were assessed for the improvement. But it appearing that Mr. Crist had been heard before the assessment committee having the matter in charge, who had made their report, the application was denied. The whole assessment amounted to over \$33,000.

A. Crist, for the relators. The whole proceeding is in violation of the constitution of this state, and of the United States. The common council had no right to fix the district of assessment, and to designate the property to be assessed. This was the duty of the assessors. The district of assessment is erroneous, improper and unjust. Lands and premises not benefited by the sewer, are included within the district of assessment and assessed for the improvement. The principle upon which the assessment is made is erroneous. The lands and premises assessed are not assessed in proportion to the amount of benefit derived from the improvement. The parties remonstrating against, and appealing from the assessment, had a right to be heard upon such appeal, before the common council, and in opposition to the confirmation thereof. After the subject had been referred back to the assessors, the common council had no right to confirm the assessment, until after new notice had been given. The whole proceeding is illegal and irregular. But if the assessment is valid, various items of expense are improperly charged and included therein.

J. Humphrey & W. Rockwell, for the respondents. I. The writ should be quashed, without looking into the return. Because, (1.) It is not a proper remedy, on account of great public inconvenience. (*Ex parte Mayor of Albany*, 23 Wend. 277, 284. *People, &c. v. Mayor of New-York*, 2 Hill, 12, 13. *Matter of Mount Morris Square*, 2 Id. 14, 28. *People v. Supervisors of Allegany*, 15 Wend. 158. *People v. Supervisors*

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of *Queens*, 1 *Hill*, 195.) (2.) Because it was not granted on proper motion in open court. (*Bradner v. Supervisors of Orange Co.*, 9 *Wend.* 433. *Albany Water-Works v. Albany Mayor's Court*, 12 *Id.* 292. *People v. Supervisors of Allegany*, 15 *Id.* 198.) (3.) Because the writ does not show who are the complainants, or set forth the irregularity complained of. (*Ex parte Mayor of Albany*, 23 *Wend.* 277.) II. Limits of the inquiry to be made by the court, if the return is looked into by them. (1.) The *certiorari* properly brings up nothing but the record of some judicial act. (*People v. Mayor, &c. of New-York*, 2 *Hill*, 11.) (2.) The court can only look into the record to see whether the common council had power or jurisdiction. (*Birdsall v. Phillips*, 17 *Wend.* 464. See also 20 *Id.* 103, 145, 148, 189. *Ex parte Mayor of Albany*, 23 *Id.* 277. *People v. Mayor of New-York*, 2 *Hill*, 10. *Matter of Mount Morris Square*, 2 *Id.* 14; 6 *Wend.* 564.) (3.) The evidence can not be considered by the court. (See above cases.) By the principles settled in the above cases, all the objections to the assessment urged by the relators are disposed of. But if the court look into the whole case, the assessment is not erroneous in either of the particulars complained of. The law directing the assessment to be made by assessors is not unconstitutional. The assessment is an exercise of the taxing power, and not an appropriation of private property to a public use. (*Livingston v. Mayor of New-York*, 8 *Wend.* 101. *Owners, &c. v. Mayor of Albany*, 15 *Id.* 375. *Striker v. Kelly*, 7 *Hill*, 23.)

By the Court, BARCULO, J. The first objection made to the proceedings of the defendants is founded upon the 6th and 7th sections of article one of the new constitution; which provide that private property shall not be taken, for public use, without just compensation; and that such compensation shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, when such compensation is not made by the state. It is contended that the assessment in question is an attempt to take private property for public use, within the meaning of the constitutional inhibition: and is void, be-

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cause no compensation has been ascertained, as required by the 7th section. On the other hand, the defendants claim that the assessment is not the taking of private property contemplated by the constitution : but that it comes within the legitimate scope of the taxing powers conferred upon them by the legislature.

The decision of this great question involves a careful inquiry into the powers of the legislature over private property ; and into the true distinction between that taking of individual property, which can be deemed a fair exercise of the sovereign right of taxation, and that which requires the constitutional compensation.

It is by no means easy to trace clearly the dividing line between the two kinds of taking of private property. It has been observed by a learned judge of a neighboring state, that "the distinction between constitutional taxation and the taking private property for public use, by legislative will, may not be definable with perfect precision." (9 *Dana*, 517.) In fact the two appear to be, in principle, somewhat blended. Both are exercises of the sovereign power over individual property. Both are requisitions for the public use. And in both cases the individual is presumed to receive, or does in fact receive, some equivalent for his contribution. Our courts, as will hereafter be perceived, have in some instances confounded the two together. Nevertheless under our constitution their practical operation is essentially different ; and it therefore becomes necessary for us, as well as we can, to draw the true line of distinction.

Untrammelled by authorities, a safe and sound rule may be deduced from a few simple and well settled principles. In the first place it may be assumed, as a fundamental principle, in our government and laws, that individuals are protected in the enjoyment of their property, except so far as it may be taken in two ways ; viz. as a *public tax, upon principles of just equality, or for public use, with a just compensation, ascertained according to the provisions of the constitution*. Secondly, as money is property, the collection of every tax or assessment is

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taking *property* in some mode ; and, to be legal, must be referable to one of the two modes above mentioned.

Taxes are defined to be "burdens or charges imposed upon persons or property to raise money for public purposes." The right to impose a tax is inherent in every government, as essential to its existence. It operates on all the persons and property belonging to the state. It is not conferred upon the legislature by any specific clause of the constitution : it passes under the general designation of "legislative power." We are not, however, to understand that the legislature is omnipotent on this subject. Its powers are limited and controlled by certain principles which lie at the very foundation of free government. Among these is the principle of *just equality*. If the tax is laid to raise a revenue for the expenses of the state, it should be laid equally upon all the property in the state, if it be a tax upon property : or, if it be a capitation tax, all persons of the taxable class in the state should be equally affected. This is the only sense in which a tax is public. The legislature has not the constitutional authority to exact from a single citizen, or a single town or county or city, the means of defraying the entire expenses of the state. For if this could be done, the constitutional prohibition would be evaded in all cases, and the legislature could take private property for public use, without compensation, to any extent, under the vague and indefinite pretence of taxation.

In carrying out this principle we must bear in mind that the state is subdivided into numerous subordinate communities, as counties, towns, cities, villages ; each of which is clothed with a local sovereignty and a *quasi* legislative authority to regulate its local affairs. The same general principles applicable to an independent state, in regard to taxation, are applicable to these subordinate bodies politic. To defray county expenses a tax must be laid upon the persons or property of the whole county : while in regard to the peculiar expenses of each town they are to be collected from the respective towns. Such has been the general course of legislation in this state : and as to the country

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portion of it, it is believed that there have been but few, if any, departures from this rule.

The principle does not permit the selection of certain individuals in a town or other district to be charged with the expense of a particular public work or improvement, under the pretence that it is for their peculiar benefit. Thus when a new road is opened, or a new bridge built, it is done at the expense of the whole town, although some of the tax-payers live several miles distant and may have no occasion for such road or bridge, and although the chief benefit is derived by a few, who live in the vicinity of the improvement. The local authorities have not the power to lay the whole tax upon the individuals whom they deem chiefly benefited, because it would not be a *public tax*. The improvement is made not for the private benefit of a few persons, but because it is a *public* benefit; otherwise the authorities would not make it at all. And if it is a public benefit, it should be a public charge.

This question is discussed with great ability by Chief Justice Robertson, of the Kentucky court of appeals, in *The City of Lexington v. McQuillan's Heirs*, (9 *Dana*, 513,) and in *Sutton's Heirs v. The City of Louisville*, (5 *Id.* 28.) In the latter case he holds this language in reference to the limit of taxation. "A common burden should be sustained by common contributions, regulated by some fixed general rule, and apportioned according to some uniform ratio of equality. Thus if a capitation or personal tax be levied it must be imposed on all the free citizens equally and alike; or if an *ad valorem* or specific tax be laid on property, it must bear equally, according to value or kind, on all the property, or on each article, of the same kind, owned by every citizen." "But the assessment in this case may not properly be considered as of the nature of a public tax, because it was not a duty or contribution levied by a fixed rule, and because also, it was not common, but was restricted to the owners of one particular lot."

The true rule deducible from sound reasoning, as well as the authorities, is this: *Legitimate taxation is limited to the imposing of burdens or charges, for a public purpose, equally upon*

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the persons or property within a district known and recognized by law, as possessing a local sovereignty for certain purposes ; as a state, county, city, town, village, &c.

This rule, it will be perceived, excludes from the operation of the taxing power all those cases in which the expenses of laying out public squares, of opening or widening streets, or of other like improvements, are charged upon certain persons or property in consequence of supposed benefits. If these cases can be sustained at all, they must stand upon some other than the taxing principle.

The decisions in the courts of this state upon this question, it is admitted, are somewhat conflicting ; and it may not be too much to say, that their apparent inconsistency, may, in part, be traced to a departure from sound principles, in allowing the real or supposed benefits arising from a public improvement to be deemed a just compensation for the taking of private property ; and to the constant struggle to sustain our city authorities in their practice of assessing the expense of improvements upon the contiguous lands ; a doctrine which in my judgment does not rest upon any solid legal foundation.

The leading case on this subject is, that of *Livingston v. The Mayor, &c. of New-York*, (8 *Wend.* 85,) in which the court of errors seem to have held that the benefit accruing to a person whose land is taken for a street, by the increased value of adjacent property belonging to him, may be set off against the loss or damage sustained by him, by the taking of his property, and if equal to the loss or damage, is a just compensation for the property so taken. The remarks of the chancellor on page 101 are cited by the defendants as an authority to show that the assessment in question was within the taxing power. The learned chancellor there says, "the owner of the property is entitled to a full compensation for the damage he sustains thereby ; but if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages. Besides, it is a well settled principle, that where any particular county, district or neighborhood, is exclusively benefited by a public improvement, the inhabitants of

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that district may be taxed for the whole expenses of the improvement, and in proportion to the supposed benefit received by each." With due respect to this very able and learned jurist, I think he was hardly warranted in intimating that it was a well settled principle of taxation that the inhabitants of a *neighborhood* were taxed for the whole expenses of an improvement, and in *proportion to the supposed benefit received by each*. I am not aware of a single instance where a *neighborhood* as such, and without some other legalized local character, can by our laws be taxed for any purpose, and much less, that such tax can be laid in any case, according to the *supposed benefit received by each*, with the single exception of the case then under consideration and those of a similar character, viz. the cases of streets, sewers, &c. in cities. Even school districts, which in the divisions of the state most nearly resembling neighborhoods that are authorized to lay a tax for certain purposes—a most fruitful source of litigation—are *quasi* corporations, created by statute; and are required to apportion the tax, not according to the "benefits," but "on all the taxable inhabitants within the district, according to the valuations of the taxable property," &c. (1 R. S. 482, § 76.)

Nor can I subscribe to the reasoning of that opinion on the subject of a constitutional compensation. Although it may at first view sound paradoxical to say that a man is injured by an improvement which benefits his property, yet when we examine the practical effect of the system of compulsory improvements it will be not at all difficult to believe that the spirit of the constitution is frequently violated.

In the first place, the benefits are *forced* upon him without his consent, and against his will. He has perhaps a few acres of land which have been improved and adorned and beautified with great care and expense. Not dreaming of rail-roads or city lots, he designs to spend his days in the enjoyment of those rural pleasures and employments. Unexpectedly, the public direct the opening of a street or avenue through the center of his grounds; and surveyors and commissioners and jurors make their appearance to calculate the quantity and value of the land

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to be taken, and estimate by dollars and cents, the cost of a grove of ornamental trees or an orchard of choice fruit; and, after having footed up the account of loss and gain, they gravely inform the astounded owner that he is *benefited*; that he can sell his lawn for a rail-road depot, and his garden for building lots, so as to realize more than he could have obtained for the whole premises before. Thus, instead of receiving any compensation for the ruin wrought upon his cherished plans and prospects, he is assessed and required to contribute, under the name of benefits, towards the expense of the work.

This is, however, but a mild and moderate instance of the workings of this system. It is when the giant hand of improvement falls upon the poor laborer or artisan, whose humble tenement and little lot of ground constitute his all, and who has no means of paying the enormous assessments imposed upon him, that it strikes with deadliest force. To such, this system may well seem to be founded in injustice and usurpation, as it brings to them oppression and ruin.

Again; those who take the property, or their agents, are the persons who decide that the owner is benefited. This may not be universally so, but it is so frequently, and is most emphatically so, in the case before us. Here the common council designate the beneficiaries, and the assessors apportion the charges among them. Such proceedings are thus spoken of by a learned court: "The public ought not to decide for any citizen, how far, or whether at all, he will be peculiarly benefited by a public work or other thing for which his property is taken without his consent. If such an arbitrary and discretionary power can be exercised in such a case, the constitutional guaranty would be of little or no value; for it would be easy to suppose cases in which even a jury would decide that the construction of a road, or the opening or improving of a street, or canal, near or through the land of another, would incidentally benefit the owner, by its resulting facilities, or by a consequential enhancement of the estimated value of his property; when in his own opinion, or even in fact, considering the use he makes, or intends to make of it, such an improvement, with

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and whose designs may have been thwarted by the improvement, ought not to be singled out as the only persons who are excluded from a participation in the incidental advantages resulting from a public work. And although it be conceded that, in most cases, those whose lands are taken receive greater benefits than the inhabitants at large, still, as these benefits are, to some degree at least, speculative and prospective, and may be estimated at an amount entirely ruinous to individuals, and as no injustice can be done by apportioning them upon the whole city, sound policy indicates the latter as the wiser and the better course.

It may be supposed, by some, that if such improvements were to be made by a general tax, it would impose too great a check upon their advancement. No apprehension need be entertained on this point. If it be true that certain individuals are so greatly benefited, they will be quite as apt to discover where their interests lie as the common council: and if their lands are to be so much enhanced in value, they will by their voluntary contributions enable the authorities to perform the work, at a very trifling expense to the city at large. But this system would undoubtedly restrain unnecessary and improper improvements: for the authorities would not venture upon them until they were required by the public exigencies or convenience, which would be a just and wholesome restraint.

The case of *Livingston v. The Mayor, &c. of New-York*, can hardly be deemed an adjudication in favor of the proposition contended for by the defendants' counsel, that this assessment is within the scope of the taxing power. It would rather seem to sustain the doctrine that it was a taking of private property as understood by the constitution, with a compensation resting in benefits. The chancellor does not place his opinion distinctly upon either ground, but intimates that both are tenable.

The next case is that of the *Owners, &c. v. The Mayor of Albany*, (15 *Wend.* 375,) in which the court held that the legislature had power to prescribe the *mode* of giving notice to the owners of property to be assessed for the expenses of opening a public square in the city of Albany. Chief Justice Savage, in

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delivering the opinion, remarks, "it cannot be conceded that any constitutional question properly arises." This was however not necessary to the decision; as there was a full compensation in benefits, according to the preceding case. The whole reasoning of Judge Savage assumes that it was not an ordinary exercise of the taxing power, but a case of private property being taken for a just compensation.

The only remaining case on this point, relied on by the defence, is that of *Striker v. Kelly*, (7 Hill, 9.) On page 24 of the opinion Justice Beardsley says, "this was local taxation for a local purpose, and falls within the legitimate exercise of the taxing power;" citing the case of *Livingston v. The Mayor, &c. of New-York*, and a case in 3 Paige, 45, which does not seem to bear upon the question. The case of *Striker v. Kelly* was the case of an assessment to pay the expenses of opening an avenue, in which there was a "just compensation," within the decision in the 8th Wendell, and the question of *taxation* did not necessarily arise. In addition, it may be remarked that the decision was *reversed*, so that the case *decides* nothing. (2. Denio, 323.)

The contrary authorities are much more clear and explicit. *In the matter of the Mayor, &c. of New-York*, (11 John. 77,) this court held that the exception of churches from *taxation* by the act passed April 8, 1801, did not excuse them from paying an assessment for benefits accruing from the enlargement of Nassau-street, on the ground that such assessment could not properly be considered a *tax*. In *Bleecker v. Ballou*, (3 Wend. 263,) it was held that an assessment for pitching and paving a street is not a *tax*, "that being a sum imposed, as it is supposed, for some public object."

In *Sharp v. Speir*, (4 Hill, 76,) it was decided expressly that authority given to sell lands for a tax of *any description* did not authorize a sale to pay an *assessment for benefits*. In delivering the opinion of the court Justice Bronson says, "Our laws have made a plain distinction between *taxes*, which are burdens or charges imposed upon persons or property to raise money for public purposes, and *assessments* for city and village improve-

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ments, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement."

If it were not otherwise manifest, these authorities establish the position that the *assessment* in question is not a *tax*, within the legal meaning of that term. If it be not a tax, then it must be an attempt to take private property, which requires a constitutional compensation. For there is no middle ground on which to stand. There is no other power either express or implied—whether wielded directly by the supreme sovereignty of the state, or by one of the minor sovereignties revolving within it—to take a single dollar of any man's property for any purpose whatever. No matter what pretence of "benefit" or "improvement" may be resorted to, to cloak the transaction, if the effect is to appropriate individual property, of any description, those who are the actors must plant themselves upon one of these two positions, for security and defence.

There is another doctrine running through the cases on this subject, which is inconsistent with the idea of taxation. It is laid down as recognized in a number of adjudications, that the assessment of expenses must *not exceed* the value of the benefit. (*Matter of Fourth avenue*, 3 *Wend.* 452. *Matter of Albany-street*, 11 *Id.* 149. *Matter of Canal-street*, *Id.* 154. *Matter of William and Anthony-streets*, 19 *Id.* 678. *Matter of Flatbush avenue*, 1 *Barb. Sup. Court Rep.* 286.) Why is this principle so constantly kept in view by our courts? Was it ever heard that an assessor, when laying a tax, inquired into the probable benefits each individual would receive? Certainly not. Taxes are laid according to the *public wants*, and are not governed by individual benefits. No benefits need be *ascertained*. Every person is *presumed* to be benefited, by his interest in the general welfare, to any amount which the public exigencies may require him to be taxed. It is only with reference to the constitutional compensation that the benefits are to be *ascertained*. And the very fact that it is necessary to inquire into the value of benefit is of itself conclusive proof that such cases are not an exercise of the taxing power.

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In the *Matter of Canal-street*, (11 *Wend.* 154,) Chief Justice Savage says, "The principle that private property shall not be taken for public use without just compensation, is found in the constitution and laws of this state, and has its foundation in those elementary principles of equity and justice, which lie at the root of the social compact. The corporation may see the extent of the benefit of any improvement before proceedings are commenced; but the extent of injury to be done to individuals can not be known to them until the coming in of the report of the commissioners; they may then be satisfied that the property which is to be benefited, will not be benefited to the extent of the assessment necessary to indemnify those whose property is taken from them. What are they to do? If they proceed, they deprive some persons of their property unjustly; if the report of the commissioners is correct, the amount awarded to the owners of property taken can not be reduced without injustice to them. If the assessment is confirmed and enforced, the owners of the adjacent property must pay beyond the enhanced value of their own property, *and all such excess is private property, taken for public use, without just compensation.*"

And in the *Canal Bank of Albany v. Mayor, &c. of Albany*, (9 *Wend.* 244,) Justice Nelson holds the following language: "It is somewhat remarkable that the law should have been so careful in securing the rights of the parties whose lands are taken for public purposes, and providing a full compensation therefor, and at the same time so utterly neglectful of the rights of those whose lands are assessed to pay such compensation. It is obvious *that the amount of private property appropriated to public purposes is just as great in one instance as the other.* The rights of one class of individuals are secured by the award of damages equal to the value of the lands taken; those of the other, by the assessment upon their lands *not exceeding the benefit.*"

It may not be improper here to advert, briefly, to the course of legislation on this subject, in this state. Prior to the year 1807, the damages and expenses of opening public streets in the city of New-York were paid by the corporation. In that

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year an act was passed authorizing the common council to appoint five freeholders, to make an equitable assessment of the damages among the owners or occupants of all houses and lots intended to be benefited, in proportion, as nearly as might be, to the advantage which each should be deemed to acquire. This practice has continued, with some modifications, to the present time. In Albany there was no assessment for benefits until the act of 1828, except in the fifth ward. This power was not originally contained in the charter of the cities of Hudson and Schenectady; but is contained in some form in the charters of all the more recently incorporated cities. In Rochester, and some other cities, the common council have a discretion to defray the expenses out of a common street fund, either in whole or in part, or by assessments upon the owners and occupants of lands benefited. (*Laws of 1834, p. 321.*) In regard to the assessment of damages for lands taken by rail-road companies, it appears that in the older charters the direction required the commissioners or jury to determine the damages sustained by the owner, without specifying any principles to guide them. However, many of the charters granted prior to 1836, authorized a vice chancellor to "direct the manner of ascertaining the damages." Such was the case with *The New-York and Harlem Rail-Road*, (*Laws of 1831, p. 323,*) and *The New-York and Erie Rail-Road*, (*Laws of 1832, p. 406.*) On the 3d of May, 1836, the act incorporating the "Attica and Buffalo Rail-Road Company" was passed, which served as a pattern for the numerous like incorporations of that prolific session, and which, in regard to the assessment of damages, has been substantially followed ever since. That charter provides that the appraisers shall "assess the value of the land taken, and the damages such owners may sustain by the taking of their lands, by injury to buildings, and in the construction of such road, *without any deduction on account of any real or supposed benefit or advantage*, which such owners of such lands may derive by the construction of such road." (*Laws of 1836, p. 323.*) On the 27th March, 1848, the legislature passed a general act in relation to the formation of rail-road companies, by which it is provided

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that commissioners shall be appointed to "ascertain and certify the compensation proper to be made to the said owners and parties interested, for the land, real estate and property so to be taken, or injuriously affected as aforesaid, *without any deduction or allowance on account of any real or supposed benefit or advantage*, which such owners or parties interested may derive from the construction of such road, and may, in their discretion, assess a separate, reasonable sum in favor of such owners and parties interested, or of any person appointed by the court to appear as attorney for them, for costs, expenses and reasonable counsel fees." (*Laws of 1848, p. 229.*) From these acts it appears that, so far as the doings of the legislature may be supposed to indicate the sovereign will, it is becoming adverse to the system of paying for property, taken for public use, by estimated benefit.

I am, by no means, disposed to call in question the sovereign right of eminent domain. But conceding it to its fullest extent, and conceding also the right of the legislature to invest cities and villages with the usual powers of making and enforcing police regulations; I am nevertheless constrained to declare, after a most careful and anxious examination of the principles upon which these powers depend, that in my judgment the authority sought to be conferred upon the corporation of Brooklyn, and brought into exercise in this case, is not within the constitutional range of legislation.

The propositions which are supposed to be fairly deducible from the foregoing reasoning and authorities are,

1. That the assessment in question is not within the scope of the legitimate and constitutional exercise of the *taxing power*.

2. That the compensation required by the constitution does not consist of real or imaginary benefits, but can only be made *in money*.

3. That improvements of this kind can only be paid for by a *regular tax*, or voluntary contributions.

4. That the assessment under consideration is, therefore, absolutely void, and must be set aside.

Although, under the former constitution, similar assessments appear to have been countenanced or sustained, on the ground

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that the benefits were to be deemed a just compensation, I think the terms of the new constitution absolve us from the authority of those unsound adjudications. The language of that instrument seems to contemplate only the taking of property in its restricted sense, and excludes the idea of money being taken. Indeed, the framers seem to have understood it as applicable to the taking of lands only. (*Debates*, 810, *Argus ed.*) It provides that the "compensation shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record." Now, if the property taken consisted of land or chattels, it is easy to understand how a jury or commissioners could meet and view the property, and estimate the amount of money to be paid as a just compensation. But in this case the defendants propose to take thirty or forty thousand dollars *in money*; and it would seem very like perverting language, and trifling with the constitution, to appoint commissioners, or order a jury, to ascertain the compensation which is to repay such an illegal exaction. For all will agree that the only mode of satisfying a fixed sum is by repaying that amount in specie. If it be said that the jury or commissioners are to assess the benefits resulting from the construction of the sewer, the answer is that the defendants have no more right to repay the money exacted, in sewers, than they have to repay it in horses, or houses, or any other property.

I think, therefore, that we are permitted to rest this case upon the solid foundation of principle. And although our decision may, and probably will, produce temporary inconvenience, it can not but be infinitely less prejudicial than the consequences which must flow from a continuing violation of that most essential and conservative feature of the constitution, which was designed to establish and secure, against all encroachments, the sacredness of private property.

Proceedings set aside.

LIVINGSTON SPECIAL TERM, March, 1849. *Welles, Justice.*

FINLEY and JONES, ex'rs, &c. *vs.* JONES.

Where two persons sue as executors, and fail in the action, one of them can not be charged with costs, on the ground that he was beneficially interested in the recovery, in right of his wife.

THIS action was brought by the plaintiffs as executors of Elizabeth Jones, deceased, to recover moneys alledged to be due to the testatrix in her lifetime. The cause was commenced in 1844, and was tried at the Livingston circuit in October, 1845, and a verdict rendered for the defendant. The plaintiffs made a case and moved for a new trial at the general term held in Allegany county, in May, 1848, which motion was denied, and the defendant perfected judgment on the verdict. By the last will and testament of the testatrix, Elizabeth Jones, the wife of the plaintiff Finley was made the residuary legatee; and if this action had been successful, the amount recovered would have gone to the said plaintiff Finley, in right of his wife as such residuary legatee; and in that way the action was brought for the benefit of Finley. The action was necessarily brought in the name of the executors, and no facts were shown which would entitle the defendant to costs as against the plaintiffs, under § 17 of 2 R. S. 615. A motion was now made that the plaintiff Finley pay the defendant's costs, to be taxed, on the ground that he was beneficially interested in the recovery; under 2 R. S. 619, § 44.

L. C. Peck & R. P. Wisner, for the motion.

James Woods, Jr. opposed.

WELLES, J. The statute (2 R. S. 615, § 16) gives costs to the successful defendant, against the plaintiff. The next section declares that the last section shall not extend to give a defendant costs against executors or administrators, necessarily

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prosecuting in the right of their testator or intestate ; unless, upon special application, the court shall award costs against them for wantonly bringing any suit, or for unnecessarily suffering a nonsuit or non pros, or for bad faith in bringing or conducting the cause.

It is not contended that the plaintiffs are liable, under this section ; but the defendant founds his application upon the 44th section above cited. That section is as follows : "Where any action shall be brought *in the name of another*, by an assignee of any right of action, or by any person beneficially interested in the recovery in such action, such assignee or person shall be liable for costs *in the same cases and to the same extent in which a plaintiff would be liable* ; and the payment of such costs may be enforced by attachment."

There can not be a judgment against Finley for these costs. The 17th section of the statute protects him, under the facts disclosed. They are not asked for against the other plaintiff ; and it would present an incongruity upon the record to render judgment against one and not the other, unless something more appears, and could be stated upon the record, than can be done here. And unless the plaintiffs, as such, are liable, by which I mean, liable to have judgment perfected against them upon the record, the 47th section, above recited, cannot apply. Again ; that section only applies to a case where one person brings an action in the name of another. There is nothing here to show that Finley had any more to do with bringing the action than his co-plaintiff. I am clearly of the opinion that the case is not within the letter of any statute ; and that it is no more within the spirit or equity of the statute than if neither plaintiff had had any personal interest in the action, and the motion had been to compel some other general legatee, next of kin, or creditor, for whose benefit the suit was brought, to pay the costs ; a proposition which could not be entertained a moment.

The motion is denied, with costs. .

OSWEGO GENERAL TERM, May, 1849. *C. Gray, Pratt, Gridley and Allen*, Justices.

COON vs. THE SYRACUSE AND UTICA RAIL-ROAD COMPANY.

A principal is not liable to one agent or servant, for an injury sustained by him in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business or employment.

Accordingly *Held*, that a person in the employ of a rail-road company, as a trackman, could not maintain an action against the company to recover damages for injuries sustained in consequence of being run over by a train of cars belonging to the defendants.

The rule of *respondet superior* does not spring directly from principles of natural justice and equity, except as those principles grow out of, and are connected with, principles of expediency and public policy. *Per PRATT, J.*

THIS was an action on the case, tried at the Oneida circuit, in September, 1847, before Justice PRATT. The plaintiff claimed to recover damages for an injury inflicted on his person by being run over by a certain train of cars called a stake train, upon the defendants' rail-road, through the alleged carelessness of the defendants. The defendants pleaded the general issue. It appeared in evidence that at the time of the injury the plaintiff was in the defendants' employ, as a trackman, and had been in their employ five or six years. His duty was to pass over the track, on a hand car, upon a specified route, after the passenger trains, and to examine the track, to fasten down loose joints, report cases of broken rails, repair fences, and drive off cattle. On the night of the accident there met at Green's corners, on the line of the defendants' road, the passenger train going east, the passenger train going west, and the stake train going west. The passenger train from the east went into a side track, or turn-out, at that place, first; and then the passenger train going west passed the side track. The passenger train from the east then backed on to the main track, and went on west, the plaintiff following it upon a hand car. The passenger train going east then backed into the side track and let

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the stake train pass on to the west, upon the main track; and lastly the passenger train going east came on to the main track and proceeded towards Utica. It was a little after dark when the stake train passed Green's corners. The accident occurred about a mile and an half west of Green's corners, while the stake train was proceeding at its usual speed. It carried no light; neither had the plaintiff any light with him, upon his hand car. There was a bed of coals in the ash-pan, beneath the engine. They made a light, which could sometimes be seen for a considerable distance. It was proved that stake trains did not usually have any other light; but that the trackmen generally carried a light, upon their hand cars. One witness, a trackman, testified that he always carried a light, in the night, excepting when it was moonlight, and that it would be difficult to repair the track without a light; that he carried it in the back of the hand car, so that trains behind him could see it, and that he might have it to fix the track with; that when going on a hand car, at the usual speed, a person could not hear a train coming behind him. This witness also stated that his instructions were to look out for the engines, and keep out of the way; that the plaintiff usually followed the passenger train going east, at evening, from the Blackman road to Green's corners, where the passenger trains usually met, and then followed the train from the east back to the Blackman road. Another witness swore that all the men employed in this business, by the defendants, carried a light, in the night, so far as he knew; and that their work could not be properly done without a light; that he was instructed to keep out of the way of the trains. J. Higgins, who had charge of the road from Rome to Blackman's corners, testified that he employed the plaintiff, for the company, at \$18 per month, and instructed him to run from the Blackman road to Green's corners, immediately after the train; that he was to run through if he could; and if he met the train going west it was his duty to run to the corners; that on the night in question the witness cautioned Vedder, the engineer upon the stake train, to be careful, as Haskins, one of the trackmen, was ahead and had no light; that he did not

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then think of the plaintiff, supposing he would be at the corners, as that was the place for him ; that Vedder had been an engineer upon the road several years, and was a careful and capable man ; that the hand cars generally carried a light after dark, but that the plaintiff never asked for one. Several other trackmen testified that they were in the habit of carrying lights. The plaintiff having rested, the defendants' counsel moved for a nonsuit, on the following grounds. 1st. That the plaintiff, when he entered the service of the defendants, took upon himself all the risks incident to his employment ; that the hazard of being run over by the trains was one of those risks, and that therefore the defendants were not liable to the plaintiff for the injuries complained of. 2d. That the plaintiff had not proved either of the acts of negligence charged in his declaration against the defendants, and therefore he was not entitled to recover. 3d. That the plaintiff had not proved that the defendants were guilty of any negligence ; but that on the contrary it appeared that the injury which the plaintiff complained of was occasioned by his own gross carelessness, and that therefore he was not entitled to recover. 4th. That the injuries complained of by the plaintiff were occasioned by a mere accident, unavoidable by the defendants, and that therefore they were not liable.

The court granted the motion for a nonsuit, and the plaintiff's counsel excepted. And a bill of exceptions having been filed, he moved for a new trial.

T. Jenkins & H. A. Foster, for the plaintiff. I. The running of the stake train in the night time, without a light, and following so soon after the passenger train, was an act of gross carelessness. It was known that the whole route was divided into sections, and that the passenger train on each section was followed by a person charged with the duty of examining the track, and that these hand cars could not keep up with the passenger train. No one could have expected the return of the stake train in the night. The lives of all the hand-car men were put at great hazard by this act. II. The negligent running of the stake train was an act of the corporation. The

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corporation acts through its *agents*. The stake train left the principal depot in Utica and passed the station at Rome. At both of these places men having the general superintendence of the company's business were stationed. The *corporation* is therefore chargeable with the carelessness of running the stake train in the night time, without a light. At any rate there was enough proof upon this subject to go to the jury. (*Angell & Ames on Corp.* 250, § 10; 328, § 9; 234, § 7.)

III. If this negligence was an act of the *corporation*, the *corporation*, upon the plainest principles, is liable. The case therefore does not fall in any respect within the reasons contained in the 4th Metcalf, 49. (1.) The negligence in that case could not be regarded as an act of the corporation: for the switch tender acted in disobedience to the instructions of the corporation; not so here. (6 *Hill*, 592. 21 *Wend.* 615. 3 *Mees. & Wels.* 1.) (2.) The switch tender and the engineer (if both had done their duty) were contributing to the immediate effect of one and the same object, to wit, the progress of the train which the engineer had in charge—not so here. The plaintiff had no connection with the stake train. His duty required him to follow the passenger train: no one was required to follow the stake train.

S. T. Fairchild, for the defendants. The declaration alleges that it was the duty of the defendants to *take care* that no train followed the plaintiff so near as to be in any danger of running over him, and to *furnish* their night trains with light sufficient to enable the engineers in charge to see forward of them, and thereby be enabled to prevent accidents; and as *the foundation of the action* alleges a breach of those duties on the part of the defendants. I. The plaintiff did not prove that any such duties rested on the defendants; nor that they were negligent in that or in any other respect. But his counsel claimed that the cause should be submitted to the jury upon the allegations in the declaration, without proof. II. The defendants exercised ordinary care. Their stake trains never carried lights, and they ran at all hours, and irregularly. They

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were the only trains that did not run at stated times. These facts were well known to the plaintiff at the time he re-engaged in the defendants' service; for he had been in the same service for a long time previous. III. The defendant was guilty of gross negligence and breach of duty, in consequence of which alone the accident occurred. (*Hartfield v. Roper*, 21 *Wend.* 618. *Dygert v. Bradley*, 8 *Id.* 469. *Rathbone v. Payne*, 19 *Id.* 401.) (1.) It was his duty to carry a light, so that he might see to do his work, and that he might be seen by the engineers. He had none. (*Brownell v. Flagler*, 5 *Hill*, 282. *Harlow v. Humaston*, 6 *Cowen*, 196. *Lane v. Crombie*, 12 *Pick.* 177.) (2.) It was his duty, after the train going west had passed him, to run down to the branch at Green's corners; but instead of doing so he neglected all that part of the track between him and the corners, put his car on the track and followed the train west towards his home, without a light—a nuisance on the road. IV. Admitting that the injury to the plaintiff was occasioned by the negligence of some person other than the plaintiff, it was the negligence of a fellow servant in the same general employment; for which the defendants are not liable. (*Story on Agency*, § 453. *Farwell v. Boston & Worcester R. R. Co.* 4 *Met.* 49. *Brown v. Maxwell*, 6 *Hill*, 592. *Priestly v. Fowler*, 3 *Mees. & Wels.* 1. *Murray v. South Car. R. R. Co.* 1 *McMul.* 385.) The plaintiff assumed the risk of this negligence, as well as all other risks incident to the business, when he entered into the service of the defendants. V. If the cause had been submitted to the jury, and they had found for the plaintiff, the court would have ordered a new trial, on the ground that the plaintiff proved no negligence on the part of the defendants nor care on his own part. Therefore the nonsuit was properly granted. (21 *Wend.* 618. 12 *Pick.* 177. 2 *Hill*, 205.)

By the Court, PRATT, J. The evidence upon the trial of this cause shows quite clearly that the plaintiff was himself guilty of negligence; and had one of the men upon the stake train been injured by the collision, the evidence would be quite as strong to establish the liability of the company to him, on

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account of the negligence of Coon, as it is in the present action.

It was the custom as well as the duty of the trackmen to carry lights at night upon the hand car, to enable them to perform their work faithfully, and to be seen by the trains. Had the plaintiff discharged his duty in that respect it is not probable that the accident would have occurred. But as the ruling at the circuit was placed principally upon another and different ground, and as the question presented for our consideration, by the decision there, has not, to my knowledge, been expressly passed upon by the courts of this state, and is a question of very great importance, from the frequency with which accidents of that kind are liable to happen upon the numerous rail-roads of the state, it may as well be met in this case at once, and the principle settled as far as an adjudication by this court can settle it.

It has become still more important that the liability of the principal to his agents or servants, in cases of accidents under such circumstances, should be clearly ascertained and settled, since the passage of the act giving the representatives, when death ensues, the right to sustain an action for the damage.

The question involved in this case has not until recently become the subject of judicial investigation, and the decision at the circuit was influenced, at least, if not controlled, by the decisions in the late cases of *Farwell v. The Boston and Worcester R. R. Co.* (4 Met. 49,) and *Priestly v. Fowler*, (3 Mees. & Wels. 1.) The correctness of the decisions in those cases was not seriously questioned by the able counsel for the plaintiff, upon the argument of this cause. Indeed in the able opinions of Chief Justice Shaw, in the former, and of Lord Abinger in the latter case, the subject, as far as the facts of those particular cases are concerned, would seem to be exhausted. And I feel that it would be presumption in me to attempt to add any thing to the force of those decisions, by way of argument or illustration. It only becomes necessary, therefore, to examine the facts in this case, and see if they present any questions differing, essentially, in principle from those presented and passed

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upon in those cases. The doctrine established by those cases I understand to be, "that the principal is not liable to one agent or servant for the injury which he may have sustained in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business or employment." (*Story on Agency*, § 453, &c. and notes. *Murray v. South Carolina R. R.*, 1 *McMullen*, 385. *Brown v. Maxwell*, 6 *Hill*, 592.)

Do the facts in the present case present the same questions? and if not, do they present questions differing essentially in principle?

First. Assuming that the accident happened in consequence of the mismanagement of the stake train, was such mismanagement the act of an agent of the company, or of the company itself? It was strenuously insisted upon the argument that the negligence must be ascribed to the company itself. The reason assigned in support of that position was, that the stake train started from the principal depot of the company, and was in fact, or must be deemed to be, in charge of a principal agent of the company. If the negligence is to be deemed the direct act of the company, it must result from one of two positions. It must result either from the character of the agents in charge of the train and the relation which they sustained to the parties to this suit, or from the character of the train itself and the fact that it started from the principal depot. To make the company liable under the first alternative there must be some general rule adopted, by which agents of a particular grade or authority represent, as to agents of a different grade, the principal in cases of this kind; and the rule adopted in the cases above cited must be restricted to cases where the negligence was occasioned by the act of an agent of the same grade, and endowed with the same authority, with the agent or servant who received the injury. All agents and servants represent their principals, for certain purposes. The principle of *respondeat superior*, with certain restrictions and limitations, is readily conceded; but to assume that the agents in charge of the stake train, in this case, represented their principal, is assuming the very point in dispute.

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In the first place there is no evidence to show that the persons in charge of the stake train at the time of the accident were agents or servants of the company, of greater or different powers or authority than the plaintiff in this suit. There was no evidence to show that he had not as great a right to command them as they had to command or control him. His business, for aught that appears, was equally necessary and important to promote the general interests of the company, as theirs.

But in the second place, if the agents were possessed of different degrees of power and authority, I can discover no principle which should make that circumstance vary the rule. There is no principle which should make the employer liable to one of his common laborers for injuries sustained in consequence of the negligence of his foreman or overseer, which should not also make him liable for the negligence of another common laborer. There cannot be any distinction of that kind. They all represent the principal, for certain purposes, and the principal is liable to a stranger for an injury received in consequence of the negligence of the former, as well as the latter. The rule itself of *respondet superior* does not spring directly from principles of natural justice and equity, except as those principles grow out of, and are connected with, principles of expediency and public policy. The negligent act is a wrong on the part of the agent, and instead of being in accordance with the instructions of his principal, it is deemed to be directly the contrary, and the agent, in cases where the principal suffers damage by his negligence, is liable to indemnify him. The dictates of natural justice, disconnected with principles of expediency, would indicate that every individual should be responsible for his own wrong, and that no person should be punished for the wrong of another. But when the rule is examined in the light of expediency, in connection with the business interests of the community, its necessity and wisdom, as applied to strangers, are manifest as one of the most salutary rules known to the law. Therefore when it is insisted that the rule shall be extended and applied to the case of one servant or agent suffering from the negligence of his fellow agent or servant, before sanctioning such applica-

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tion by judicial decision, we should examine carefully the difficulties which may arise, and the effect which may result from such application, to the community at large. }

Some of the consequences which would result from the extension of the rule to cases of this kind, will be found in the opinion of Lord Abinger in *Priestly v. Fowler*. "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible, by his general duty or by the terms of his contract, for all the consequences of negligence in a matter in which he is principal, is responsible for the negligence of all his inferior agents. If the owner of a carriage is therefore responsible for the sufficiency of his carriage, to his servants, he is responsible for his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or a defect in the harness, owing to the negligence of the harness-maker, or for the drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not be extended, if applicable in this class of cases, to many others.

The master would be liable to his servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer in sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat injurious to health; of the builder for a defect in the foundation of the house whereby it fell and injured both the master and the servant by the ruins. The inconvenience, not to say absurdity, of these consequences, afford a sufficient argument against the application of the principle." And again—
"In most cases in which danger may be incurred, if not in all, the servant is just as likely to be acquainted with the probability and extent of it, as his master. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to }

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Not exercise on the behalf of his master to protect him against the misconduct and negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."

The reasoning of Chief Justice Shaw, in *Farwell v. Boston and Worcester Rail-Road Company*, is equally clear and conclusive, and applies as well to injuries sustained by an agent in consequence of the negligence of another agent endowed with greater or less authority by the principal, or of one of the same authority. There can not therefore, I think, be any reason for a distinction.

But as to the second alternative, it was claimed upon the argument that the stake train must be deemed to be under the immediate management of the company, because it was a train with an engine attached to it, and because it started from the principal depot of the company. Its having an engine attached to it can not vary the liability of the owners, nor change the character of those having it in charge. They are still the agents of the company, and although, for aught we know, they may be higher in authority, or engaged in a more important or dignified calling, yet, as we have attempted to show, the liability of the principal, for their acts, is not for that reason changed.

As to the assumption that the train started from the principal depot of the defendants, and must therefore be deemed to have started under the supervision of the defendants, there are various answers to this position. 1st. It was not proved that Utica was the principal depot of the company. 2d. If it were so, there is nothing to show that the trains started under the direction of the company. The company, being a corporation, must necessarily do its business through the medium of agents. It has no corporeal or physical existence, and can not therefore superintend the road, or run the trains, in person. The directors, as a board, can prescribe rules and regulations for the management of the road and as a guide to their agents. The adop-

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tion and publication of these rules must undoubtedly be deemed, so far as they do not come in conflict with the provisions of their charter, the act of the company itself; and so long as their agents act in accordance with these rules their acts must be deemed the acts of the company. Indeed the same rules should be applied to a corporation as should be applied to an individual who carries on a business solely through the medium of agents and servants. But there was no evidence to show that this train was started on this occasion and run in obedience to the rules and regulations of the company. On the contrary the whole struggle at the trial, on the part of the plaintiff, was to establish the fact that the train was running in an unusual time and in an unusual manner. If that were so, I am unable to discover the evidence that the company authorized it. But assuming that the train was run in strict accordance with the regular rules and regulations of the company, (for it will not be contended that there was any meeting of the board in relation to this particular train, for this particular occasion,) it will be equally fatal to the plaintiff's right to recover. The plaintiff will be deemed to have contracted for his services with a full knowledge of the regular rules and business of the company, and to have taken upon himself the risks necessarily growing out of such business. Indeed it would be impossible to predicate negligence of what was done in the regular course of the ordinary business of the company. They have a right to make any regulation which they may deem proper, to promote their own interests; and their servants, if they do not wish to run the risk, must leave their employment. I see no reason why they may not, as far as their own servants are concerned, run their cars without lights, and at any hour they please, provided their rules in that respect are known to those who enter their employment. If, on the other hand, the train was running out of time and without lights, when it was their duty to carry them; in other words if there was negligence in the management of the train, it should, in the absence of proof to the contrary, be deemed the act of those having it in charge. They would be liable to the company for the damage which the train

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might sustain; and if a recovery should be had against the company, the conductor, or those in charge of the train, would be liable to indemnify the company. There is also another answer to this suggestion in relation to the liability of the company on account of the train having started from the principal depot. It does not appear that the time of starting from Utica was necessarily connected with the accident, or that there was any difficulty in running the train over the track to the place of destination without injuring the workmen on the road. On the contrary it was strenuously insisted, on the trial, that the conductor of the stake train was guilty of negligence in starting from Green's corners so soon after the passenger train had passed, and in not having his lamps burning. If there was any negligence in any part of the conduct of the train, it was in thus starting without a light. It can scarcely be pretended that the company authorized him to start at such a time and in such a condition as to endanger the lives of other workmen upon the road. It is therefore simply a case of one servant being injured through the negligence of another servant or agent of the same principal, and comes, as far as that part of the case is concerned, directly within the principle decided in the cases first above cited.

Secondly. Were the plaintiff and the conductors of the stake train employed in the same general business? The business of the plaintiff was to examine certain portions of the road after the passing of each train, to see if the rails were in their proper positions, and the road in order. The stake train was used for conveying materials to repair the road. The great object and business of the company are to transport passengers and freight between the cities of Utica and Syracuse. To facilitate this business, and to render the road capable of performing the business required of it by the public as well as by the interests of the stockholders, a great many different agents and workmen are necessarily employed. To these are assigned various duties; to some are assigned the duty of examining the track of the road; to others the keeping the road in repair; some are engineers and some brake-men; some are conductors and some

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switch-men ; but they are all necessary and indispensable for carrying out the primary object, to wit, the safe and speedy transportation of passengers and freight over the road. They are all engaged in one general business and common enterprise. Just as clearly so as in the case of *Farwell v. The Boston and Worcester R. R. Co.* Some kinds of business, from the nature of such business, necessarily require a great variety of agents and workmen ; and the hazard of the business, we may well conceive, may be materially enhanced from the great number of servants it may become necessary to employ in carrying it on. The person, therefore, who contracts to enter into the service of a man or company engaged in a business of that character must, when he contracts, regulate his compensation so as to meet the increased risk, or provide in the contract for indemnity against injury in consequence of the negligence of his fellow servants. He then has an opportunity to examine into the nature of the business, the number and character of the persons employed, the duties assigned to each, and every thing bearing upon the dangers incident thereto ; and must provide for the same in his contract. It is obviously the duty of the employer to do nothing which would unnecessarily endanger the safety of those in his employ. He should not knowingly employ unskillful or negligent servants, or knowingly do any act by which the dangers ordinarily connected with the particular business should be increased, without at least giving notice to those who may be affected by it. There is nothing in the case showing any want of diligence on the part of the defendants, in that respect.

For any thing that appears, those in charge of the stake train were possessed of the requisite skill, and were ordinarily careful and prudent men. That is all that could be required of the defendants in that respect.

The plaintiff has been, it appears by the evidence, very seriously injured. If the company, out of their abundance, have not acted generously with him, we regret it ; but with the subject judicially we have nothing to do. It is our duty to ex-

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pound the law as we find it, and leave the parties to exercise that degree of generosity to each other which their own consciences may dictate.

New trial denied.

SAME TERM. *Before the same Justices.*

VAN EPS vs. DILLAYE and others.

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Where, in an action against three defendants, sought to be charged as partners, only one appears and defends, the others not being served with process, or failing to appear, the latter can not object to the sufficiency of the evidence of their liability; and it is sufficient for the plaintiff to show that the defendant who alone appears and defends was a member of the firm by whom the debt was contracted, and as such liable to the plaintiff.

The acts of one partner, though after dissolution of the partnership, will bind his copartners, in respect to all persons who have previously dealt with them as a firm, except those to whom actual notice of the dissolution has been given.

In the absence of proof of such notice, and in the absence of any thing upon the face of the contract to show that a person executing notes in the names of himself and others, as copartners, had no authority to bind the others, he will be estopped from denying the joint liability of himself and those whom he undertook to bind.

Where a creditor accepts the individual obligations of one of several partners, or of a third person, and thereupon gives up notes of the partnership, such obligations will not be considered as any thing more than the conditional payment of an existing debt; unless it is proved that they were agreed to be taken absolutely as payment of such debt.

The question in such cases, always, is whether the creditor agreed to, and did, accept the notes, either of the debtor or of a third person, as *payment* of the original debt. If he did not, the original debt is not discharged, and the remedy upon it is only suspended until the maturity of the notes received.

And where, after individual obligations, turned out by a partner to satisfy a partnership debt, have arrived at maturity and been dishonored, such partner voluntarily gives the creditor a new note in the name of the firm, for the amount of the original debt, this will be considered as evidence of the understanding of the parties that the substituted obligations were not turned out, or taken, as absolute payment of the partnership debt.

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THIS was an action of assumpsit upon two promissory notes dated Oct. 3, 1842, signed by Dillaye, Hayden & Co. and payable to the order of the plaintiff, six months after date; one of which was for \$108,35, and the other for \$108,36. The defendant Dillaye pleaded the general issue, and payment, and gave notice of set-off. The other defendants did not appear. The cause was tried at the Madison circuit in Feb. 1849, before Justice GRIDLEY. The plaintiff read in evidence the deposition of John Van Eps, taken before a referee appointed for that purpose. The witness testified that in 1841 and 1842 he was in the employ of the plaintiff, in the city of New-York, as clerk or agent, and he proved the sale and delivery to the defendants, in October, 1842, of a bill of goods amounting to \$216,71, for which two notes were given, one for \$108,35, and the other for \$108,36, payable in six months. That the goods were sold to the firm of Dillaye, Hayden & Co., Dillaye selecting the goods and executing the notes. The witness testified that he had charge of the debt in question, for the purpose of collecting it, until the notes were put into an attorney's hands for collection in June, 1848, and that the same had not been paid; that in 1843 or 1844, Dillaye gave the witness, on account of the notes, a draft for \$100, a part of the amount, on the Messrs. Wards of Milwaukie, which was sent on to Milwaukie for collection, and came back dishonored; after which it was returned to Dillaye; that at the time the draft was given, Dillaye told the witness that the Wards had lead, or property, in their hands, on sale, belonging to Dillaye, Hayden & Co.; that Dillaye, at the same time, gave the witness an agreement to ship lead to the city of New-York to pay the balance of the notes, but the lead was never sent, and the agreement was subsequently given up; that the witness informed Dillaye that the Wards refused to accept the draft because they had already accepted to the amount of property in their hands; that Dillaye made a great many apologies, and promised to have the matter righted, and that in August, 1844, he promised that this debt should be paid, every dollar of it. This was after the draft had been given up to him. That the original notes were given up to Dillaye at the time of taking the draft and

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the agreement for the delivery of the lead ; the draft and agreement being taken in lieu thereof. The draft and agreement were signed by Dillaye individually. At the time of giving the draft and taking up the original notes, Dillaye gave to the witness his note for \$107,33, payable on demand, to cover the balance of the original notes, after deducting the amount of the draft on the Wards. The note was payable to the order of the witness, because it was thought more convenient to have it so, as the plaintiff, his brother, had sold out, and the witness was settling his business for him, by virtue of a power of attorney ; and he made a deduction from the bill, at Dillaye's request. That such deduction was made on account of what Dillaye said about there being a defect in some of the articles, and upon his agreement that the draft and note should be paid promptly ; that Dillaye represented that the last note and draft would be paid, and that the lead would be shipped, which was the reason for the witness' taking them and giving up the original notes ; he knowing that the firm of Dillaye, Hayden & Co. was not in good credit, but having confidence in Dillaye, and thinking he should get speedy payment in that manner. The notes on which this suit was brought were received from Dillaye in the spring of 1844, being ante-dated, to correspond nearly with the original notes ; and Dillaye took back his note and draft. This was after the witness had written to Dillaye, on the subject. The plaintiff proved by J. H. Spencer, another witness, that he had heard the defendant Dillaye state who constituted the firm of Dillaye, Hayden & Co ; that in the year 1846, Dillaye was examined as a witness in a cause in which King & Dow were plaintiffs and the defendant Williams was defendant, and stated that the firm of Dillaye, Hayden & Co. consisted of himself and the defendants Hayden and Williams ; that Hayden went out of the concern in the winter of 1842, and the partnership was terminated in the spring of the same year. The execution of the notes in suit was admitted, by the defendants' counsel, to be in the hand-writing of the defendant Dillaye ; and the notes were then read in evidence. The plaintiff having rested, the defendants moved for a nonsuit, on the ground that, the plain-

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tiff having taken the note of one of the partners, and his draft on the Wards, together with his agreement to deliver a quantity of lead, and given up the partnership notes, this was an extinguishment of the partnership debt and prevented a recovery against the firm. The motion was denied, and on the suggestion of the judge, and by consent of counsel, a verdict was taken for the plaintiff, in form against the three defendants, and the plaintiff's damages were assessed at the amount due upon the notes for principal and interest, subject to the opinion of the court, on a case.

N. Foote, for the plaintiff. I. The reception of the draft, note and agreement of Dillaye by J. P. Van Eps, and the surrendering of the original notes, was not a payment of the original indebtedness. (1.) J. P. Van Eps was a special agent, appointed by the plaintiff to settle and collect his outstanding debts. He had no authority to appropriate this debt to his own use, by taking a note and draft in his own name of one of the sureties of a firm, and cancelling the original indebtedness. (2.) Notwithstanding the draft was the individual draft of Dillaye, still Dillaye pretended it would be paid out of the funds of the firm, which shows clearly that J. P. Van Eps relied upon the funds of the firm for the payment of the draft, and therefore could not have intended to release the liability of the firm. The subsequent conduct of Dillaye, in executing and delivering to J. P. Van Eps two notes corresponding with the original notes given on the purchase of the goods, shows that he did not consider the firm released from the indebtedness. (3.) The surrendering of the notes of the firm on the reception of the individual security, by note and draft of one of the members of the firm, is not evidence that they were received in payment of the debt. On surrender of the note and draft an action may be sustained to recover on the original consideration. (*See Cole v. Sackett*, 1 *Hill*, 516, and cases there cited; *Waydell v. Luer*, 5 *Id.* 448; *Same case affirmed in court of errors so far as this question is involved*, 3 *Denio*, 410; *Halliday v. McDougall*, 22 *Wend.* 264.) In each of the above cases the partnership

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notes were given up and the individual note of one of the partners received in lieu thereof, after dissolution of the firm and notice to the plaintiff; neither of which were done in this case. In all of the cases referred to by the defendant's counsel on this point, even in the case of *Arnold v. Camp*, (12 John. 409,) the note was surrendered and a new one taken after notice of the dissolution of the firm. II. Dillaye, by the giving of the last notes, undertook to place the plaintiff in the same position he occupied at the time of the execution of the first notes. And the surrendering of the draft, note, and agreement executed by Dillaye, in his individual capacity, is sufficient consideration to sustain the promise, and he is estopped from setting up the fact of the dissolution of the firm previous to the execution of the notes, as a defence to this suit. He virtually said to the plaintiff that the firm of Dillaye, Hayden & Co. was still in existence, and that he had power to execute said notes; and the plaintiff, relying upon the undertaking of Dillaye, surrendered the demands he held against him individually; and he can not now say he had no such power. He evidently attempted to practise a fraud upon the plaintiff, which should not enure to his benefit. (See *Coven's Tr.* 946.) The recovery in form against the firm, will not prejudice the rights of the other partners. (See *Bruen v. Bokee*, 4 Denio, 56.) III. Notice of the dissolution of the partnership should have been served on the plaintiff. The last notes were executed before the giving of such notice, and the plaintiff having dealt with the firm, and the notes being given on a good and valid consideration, all the members of the firm are liable on the notes. (See *Vernon v. Manhattan Co.* 17 Wend. 526; 6 John. 144, and cases there cited.)

H. J. Sedgwick, for the defendant Dillaye. I. There is no proof of partnership. The only evidence is furnished by the declarations of Dillaye. Not one word is proved against the other defendants. (See *McPherson v. Rathbone*, 7 Wend. 216; *Halliday v. McDougall*, 21 Id. 264.) II. The taking the draft on the Wards, and the individual note and contract for

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lead of Dillaye, and giving up the notes of the firm, was a payment of the partnership debt. (*Story on Part. § 155. Thompson v. Percival*, 5 *Barn. & Adolph.* 925. *Arnold v. Camp*, 12 *John.* 409. *National Bank v. Norton*, 1 *Hill*, 572, 577. *Mitchell v. Ostrom*, 2 *Id.* 520. *Waydell v. Luer*, 3 *Denio*, 410.) III. The giving of the notes by Dillaye, on which this suit is brought, was without authority and can create no obligation on the partners to pay; they having been given long after the dissolution. (1 *Hill*, 575.) IV. The declaration being on a joint undertaking, the plaintiff is bound to prove it as such, or he can not recover. (2 *Hill*, 520. *Sheriff v. Wilkes*, 1 *East*, 48.)

By the Court, ALLEN, J. The defendants, Hayden and Williams, were either not served with process, and in that case are not bound, or in any way affected, by the verdict and judgment, unless they claim to own property jointly with Dillaye, or else, having been served with process, they have failed to appear, and suffered default, and thereby admitted the right of the plaintiff to recover. And in either case they can not object to the sufficiency of the evidence of their liability; and it was sufficient for the plaintiff to show that Dillaye, who alone appears and defends, was a member of the firm of Dillaye, Hayden & Co. and as such, liable to the plaintiff in this action. (*Whitney v. Sterling*, 14 *John.* 215. *Halliday v. McDougall*, 22 *Wend.* 264.) The existence of the copartnership between the defendants was abundantly proved as against Dillaye; 1st, by his acts and dealings with the plaintiff; and 2dly, by his admissions under oath when examined as a witness in another cause to which he was not a party.

Had the action then been upon the notes originally given to the plaintiff, and there had been no intermediate dealings between the parties, the right of the plaintiff to recover would have been indisputable. But it is insisted that the notes, to recover which this suit is brought, were given by Dillaye after the dissolution of the firm of Dillaye, Hayden & Co., and without authority of his former copartners, and that therefore there

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is no joint liability on the part of the defendants. It is a well settled rule that after the dissolution of a copartnership one member of the firm can not bind his former partners by any new contract, even by the renewal of a partnership note, or by an endorsement of negotiable paper held by the firm. (*National Bank v. Norton*, 1 *Hill*, 572.) But this principle will only affect contracts made after dissolution, with one who had not before had dealings with the firm, or having had dealings with them, had had actual notice of the dissolution. The acts of one partner, though after dissolution, will bind his copartners in respect to all persons who have previously dealt with them as a firm, except those to whom actual notice of the dissolution has been given. (*National Bank v. Norton*, *supra*. *Vernon v. Manhattan Co.* 17 *Wend.* 524. 6 *John.* 144.)

In this case, there is no evidence that the plaintiff, or his agent, had any notice whatever, at any time before the trial, that the copartnership of Dillaye, Hayden & Co. had ceased to exist, or had been dissolved. And in the absence of proof of such notice, and in the absence of any thing upon the face of the contract, as in *Mitchell v. Ostrom*, (2 *Hill*, 520,) to show that Dillaye had no authority to bind the other defendants by the notes now in suit, it might well be held that Dillaye was estopped from denying the joint liability of himself and those whom he undertook to bind; and the case be disposed of upon this ground. (*Hawks v. Munger*, 2 *Hill*, 200.) It is, however, claimed by the defendant Dillaye, that the plaintiff agreed to, and did, take his individual note and draft not conditionally, but absolutely in payment of the firm notes, which were given up. But the evidence is that they were taken upon the express assurance that the bill was drawn against funds in the hands of the drawee, and would be accepted and paid, and that the note would be paid at the time and in the manner then agreed upon. The drawees refused to accept or pay the draft, and Dillaye did not pay the note. The partnership debt was not then in fact paid. The securities taken by the plaintiff had proved utterly unavailing, and the firm had parted with and lost nothing. It does not appear that any member of the firm, except Dillaye, ever

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knew of the transaction. Then if the plaintiff had agreed to accept these individual liabilities of Dillaye, in payment of the notes of the firm, he had done so under a mistake, and there was a good reason why he should be placed in the same situation in which he was before the dealing with Dillaye; and this doubtless the firm had a right to do. There can be no doubt, I think, that the original debt of the firm and the surrender of the individual obligations of Dillaye would have proved a good consideration for a new note, and if given by one member of the firm while the copartnership was in existence, or by the members individually after the dissolution, it could not have been impeached in either case for want of consideration, or in the first case for the reason that it was given for the individual debt of one of the partners; and if so, the notes for which this suit is brought are valid notes; for the plaintiff had no notice of the dissolution, and the copartnership between the defendants, in respect to him, must be considered as continuing up to the time of the giving of those notes. In *Mitchell v. Ostrom*, (*supra*,) the note was signed "late firm of M. I. E. & Co.," and by such signature, the court held that only the party signing it was bound, and that he should have been sued alone. In *Arnold v. Camp*, (12 *John*. 409,) the creditor had, after the dissolution of the copartnership, and with *notice of such dissolution*, taken the note of one of the members of the firm under circumstances in respect to which the court say "the facts not only fairly but necessarily lead to the conclusion that the individual note of Doney was intended and agreed to be considered as *payment* of the partnership note," and the creditor afterwards induced the individual partner to give back the firm note, and the defence was interposed not by the partner who had treated with the creditor and assumed the payment of the partnership debt, and afterwards undertook to charge his former partners, but by one of the other partners, so that the whole case turned upon the question whether or not the note of one partner had been taken as payment of the partnership debt; and was disposed of upon that ground. In that event, Doney had no right to bind the firm by a new contract with the plaintiff, he having notice of the dissolution,

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which the plaintiff in this case had not. The case of *Waydell v. Luer*, (3 *Denio*, 410,) was decided upon the same principle. The plaintiff is, in my opinion, entitled to a judgment upon the verdict, upon the ground that the notes given by Dillaye in 1844, and upon which this suit is brought, must be considered and held, as against Dillaye, to be the notes of the firm, and that for all the purposes of this action, the joint liability of the defendants is sufficiently established. This is upon the assumption that by the giving of the individual draft and note of Dillaye and their acceptance by the plaintiff the partnership debt was paid and discharged as is claimed by the defendant. I do not, however, think the evidence shows this to be the fact. It must be considered as settled by the adjudications in this state that the notes of the debtor, or of a third person, will not be considered as any thing more than the conditional payment of an existing debt, unless it is proved that they were agreed to be taken absolutely as payment of such debt. (*Story on Pr. Notes*, § 404. *Arnold v. Camp. supra.*) The question in such cases is always whether the creditor *agreed to and did accept* the notes, either of the debtor or of the third person, as *payment* of the original debt. If he did not, the original debt is not discharged, and the remedy upon it is only suspended until the maturity of the notes received. (*Waydell v. Luer*, 3 *Denio*, 410, and the cases cited by Lott, Senator.) I can not, upon the evidence, arrive at the conclusion that the plaintiff intended to, or did agree to accept the individual obligation of Dillaye as payment of the partnership debt; and the act of Dillaye himself, who now insists upon the alleged payment, entirely repels every presumption arising from the other circumstances in the case. The plaintiff's agent was induced to believe that the note and draft given by Dillaye would be paid in a particular manner, and he took them and gave up the partnership notes, relying upon the assurance of Dillaye to that effect; and after the dishonor of the draft and the non-payment of the note Dillaye himself undertook to reinstate the plaintiff in the same situation in which he had been before, and to give him the liability of all the members of the firm, in the same form in which

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he held it before this transaction; thus showing most clearly, that Mr. Dillaye did not understand that the plaintiff had taken his notes as payment of the partnership debt. For we can not suppose at the suggestion and for the benefit of Mr. Dillaye, who alone defends, that he contemplated a fraud upon his partners. At all events, he can not well insist that the partnership debt is paid by his own notes which have been surrendered to him in consideration that the firm should continue liable for the debt. The plaintiff is entitled to judgment on the verdict.

Judgment for the plaintiff.

SAME TERM. *Before the same Justices.*

PECKHAM vs. TOMLINSON and NEY.

The fact that a person prefers a criminal charge against another, before a justice of the peace, and is a witness upon the trial of the accused, and employs counsel to conduct the trial, on the part of the people, will not render him liable, in an action for assault and battery and false imprisonment, for the consequences of an erroneous conviction by the justice; where there is nothing to connect him with the unlawful imprisonment of the plaintiff.

ACTION for an assault and battery and false imprisonment. The defendant Tomlinson pleaded the general issue. The defendant Ney pleaded the general issue, with a further plea of justification. In January, 1846, the plaintiff was arrested by a constable upon a warrant issued by the defendant Tomlinson, a justice of the peace, upon the complaint of Ney, a constable, for an assault upon him while performing his duties as a public officer. Being brought before the justice the plaintiff was arraigned upon the warrant, and pleaded the general issue. He appeared by counsel, waived an examination, and demanded a trial by jury. The justice thereupon issued a venire, and a jury was summoned. No objection was raised, on the trial, to

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the jurisdiction of the justice. The jury rendered a verdict of guilty, and Tomlinson fined Peckham \$5. The justice thereupon issued a mittimus, reciting the conviction, and that it was adjudged that Peckham should pay a fine of \$5, or be imprisoned for thirty days, and directing that he should be imprisoned until the expiration of that time. It appeared from the venire and mittimus that Peckham was convicted of an assault and battery, simply. The mittimus was handed to Sanford, a constable. He, being under the necessity of going away for a few days, told Peckham, when he left, that he hoped he, Peckham, would arrange the matter before he got back, and that if he did not, he should be obliged to take him to jail. Sanford testified that Peckham was in his custody after he received the mittimus; that nothing was said as to how he was to remain while Sanford was absent; that he was gone from one to three days, and when he returned he called to see Peckham, and asked him if he had arranged that matter. He said he had not. Sanford then told him he should have to be just as strict with him as with any body else, and that if he did not pay up he should have to take him to jail. Peckham then went, with Sanford, to the office of Tomlinson, the justice, and paid the \$5 to him. That Peckham was not confined, nor was he prevented from attending to his ordinary business, from the time of the trial up to the time of paying the fine to the justice. That he, Sanford, did not leave him in charge of any one while he was absent from home. It appeared that Ney was present at the trial, and employed counsel to conduct the same in behalf of the people, and was examined as a witness; but there was no active interference on the part of Ney. The cause was referred to a referee, who reported that he found Tomlinson guilty, and assessed the plaintiff's damages at \$5, and that he found Ney not guilty. The plaintiff moved to set aside the report, and for a new trial.

T. Jenkins, for the plaintiff.

C. P. Kirkland, for the defendants.

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By the Court, GRIDLEY, J. To justify a report against the defendant Ney, the referee must have found that he either directly or indirectly participated in the imprisonment of the plaintiff. It is true, he procured the original warrant to be issued, prior to the arrest of the plaintiff; but that arrest, and the imprisonment under it, were lawful. If the plaintiff was ever arrested under the warrant of commitment, (of which there is great reason to doubt, notwithstanding the *general* statement of the constable,) there is no proof that Ney directed, or participated in, such arrest, or even knew that a mittimus was issued. True, he was the original complainant, and was a witness on the trial of the plaintiff; but that does not make him responsible, in this action, for the consequences of an erroneous conviction. Nor does the fact that he employed counsel to conduct the trial, on the part of the people, alter the case. It will not be insisted that the counsel, himself, would have been liable for the act of the justice in issuing the mittimus; and, certainly, the case is not stronger against the individual who employed and paid him. We are referred to the case of *Bishop v. Ely*, (9 *John.* 294,) to show that Ney was liable. In that case, however, the defendant was the owner of the wagon, and was riding in it when it was driven against the plaintiff's horse, and made no objection to such a use of his property; and after the injury had been done, instead of disavowing the acts of the driver of the vehicle, he showed by his acts and conversation that he had countenanced and encouraged it. In this case, as we have seen, there is nothing to connect Ney with the unlawful imprisonment of the plaintiff, so as to make him legitimately responsible for its consequences. If Ney should be held to such responsibility, his guilt must be made out by inference and presumption; and after the referee has passed upon that question, I do not think that this court can review and reverse his decision.

Again; upon the evidence in this case the plaintiff does not show a very meritorious cause of action. He was, for aught we can see or know, guilty of the offence of which he was convicted; and if he had not been inadvertently put on his trial for an offence a grade higher than that proved against him, no

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action could have lain against either of the defendants. The action then rests for its foundation upon an error of the justice, which did not injure the plaintiff by preventing him from establishing any defence in his power to prove, though it rendered the conviction void. The damages of the plaintiff under the last arrest would have been assessed at a very small sum, by any jury. It is, for these reasons, not a case in which the court should, in the judicious exercise of their discretion, grant a new trial. (*See Graham's Pr.* 515, and the cases there cited.)

New trial denied.

SAME TERM. *Before the same Justices.*

FOX vs. AMES and BAKER.

To render the sureties in an appeal bond liable, execution must be issued against the appellant within thirty days after the rendition of the judgment in the appellate court.

The 24th section of the act of 1840 concerning costs and fees, which provides that executions shall not be issued until thirty days after judgment, does not apply to executions issued on judgments rendered upon appeal.

The decision in *Lipe v. Becker*, (1 Denio, 568,) upon this point, approved.

A *ca. sa.* is an execution, within the meaning of the act of 1842, amending the revised statutes so as to require executions to be issued within thirty days after the time when by law such execution could be issued, and the 22d section of the act concerning courts held by justices of the peace.

ERROR to the county court of Oswego county. The action in the court below was brought upon an appeal bond; and the plaintiff was nonsuited because he had not issued execution on the judgment against the appellant, within thirty days after the rendition of the judgment against him. The execution was in fact issued thirty-one days thereafter.

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H. A. Foster, for the plaintiff in error.

W. C. Thompson, for the defendants in error.

By the Court, GRIDLEY, J. By the revised statutes (2 R. S. 263, § 222,) the sureties on the appeal bond were discharged unless execution were issued within thirty days after the *term* at which the judgment was rendered. The act of 1842, (*Laws of 1842*, p. 21,) amended the revised statutes so as to require execution "to be issued within *thirty days after the time when by law such execution could be issued.*"

The execution in this case was issued after the expiration of thirty days from the rendition of the judgment; and it is now argued, that by the act of 1840, (*Laws of 1840*, p. 327, § 24,) the execution could not be issued until thirty days after judgment, and that therefore the execution was issued within the required period, after the time when by law it could be issued. This raises the question whether the provision contained in the 24th section of the act of 1840, applies to executions issued on judgments rendered on appeal. Although the words of the enactment are general, and are comprehensive enough to embrace executions of this description, and notwithstanding many other provisions of this act must of necessity apply to judgments upon appeal, as well as to those rendered in original suits, yet it is manifest that to give the prohibitory clause an application to executions in cases of appeal would necessarily destroy all remedy on the bond. Such an application therefore could not have been within the intent of the framers of the act. And the late supreme court, in the case of *Lipe v. Becker*, (1 *Denio*, 568,) held that the provisions in the act in question did not apply to this class of executions. We are inclined to adopt this decision as a sound exposition of the act, although it would seem not to have been indispensably necessary to a determination of that suit.

But whether the doctrine of that case be sound or not, the act of 1840 is, by its terms, confined to writs of *feri facias*. Writs against the body are *executions*, within the meaning of the act of 1842, and the 222d section of the act concerning courts held

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by justices of the peace. (2 R. S. 263.) They are moreover quite as likely to produce the money as executions against property only. The judgment against the appellant, in the court below, was in trover, and a ca. sa. might have been issued immediately. If then no other execution could be issued within thirty days, by reason of the prohibitory clause in the act of 1840, it was, in our judgment, the *right* of the surety to have a ca. sa. issued within that time. The surety has a right to require the creditor to comply with the obligations imposed by the law, as a condition of his liability, to the full extent of such obligation. The issuing of an execution against the appellant within thirty days after the rendition of the judgment, was a condition precedent to be performed by the creditor. A ca. sa. is an execution, within the true interpretation of the act, requiring an execution to be issued. There was no impediment in the way of issuing such an execution, and no excuse for not having done so.

The judgment must be affirmed.

SAME TERM. *Before the same Justices.*

JUDD vs. ENSIGN.

Where, in an action against a party for a forfeiture of a contract executed in duplicate, the copies produced by the respective parties vary in their phraseology, the court will follow the copy which is in the defendant's hands and by which he was governed in making his payments.

Where, by the terms of a contract, dated Dec. 24th, for the sale and purchase of land, the payments were to be made as follows: "\$100 on the date hereof, \$100 by the 1st of May next, and the residue to be paid in annual payments of \$100 each, with interest on the whole sums unpaid from the date hereof," *Held* that the "residue" was payable in annual payments computed from the 1st of May, and not from the date of the contract.

Although, as a general rule, money payable at no particular place must be tendered personally to the person to whom it is payable, yet where, on the day

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previous to the time when a payment upon a contract became due, the debtor made an ineffectual attempt to find the creditor, but his house was closed, and nobody at home: *Held* that a tender made at the house of the creditor, on the day, to his family, he being absent from home and out of the county, was valid; the creditor being chargeable with notice that the money would be tendered at the day, and it appearing from the circumstances, that the creditor, by his voluntary absence, &c. intended to render it impossible for the debtor to make a valid payment on the day it became due.

EJECTMENT, to recover a part of lot No. 73 of the original town of Hannibal, tried at the Oswego circuit, before the Hon. HIRAM GRAY, one of the justices of this court, in December, 1848. It appeared upon the trial that the plaintiff had sold the premises in question, consisting of about thirteen acres of land, to the defendant, on the 24th of December, 1841, and an agreement was entered into between the parties, bearing date on that day, by which the plaintiff agreed to convey the land to the defendant upon his paying the purchase money therefor; and the defendant, according to the contract as set out in the plaintiff's declaration, agreed to pay the "sum of twenty-five dollars per acre for said land, in manner following, to wit: one hundred dollars on the date hereof, one hundred dollars by the first day of May next, and the residue to be paid in annual payments of one hundred dollars each [from the date hereof] with interest on the whole sum unpaid." The agreement contained a clause reserving to the plaintiff the right to declare the contract void, and to take immediate possession of the premises, in case of the non-payment of either of the installments, by the defendant. Duplicate copies of the agreement were executed by the parties, each party retaining one. The copy produced by the plaintiff contained the words "from the date hereof," in the clause respecting the times of paying the purchase money, as placed in brackets above; but in the copy in the defendant's hands those words were placed at the end of the sentence, viz. "with interest on the whole sum unpaid from the date hereof." The plaintiff claimed a right to recover the possession of the premises by reason of a forfeiture of the contract, on the part of the defendant, by the non-payment of the purchase money. The defendant insisted that there had been no forfeiture incur-

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red ; that all the installments had been paid except the last, and that that installment was not due, by the terms of the contract, until Dec. 1849, but that on the 1st of May, 1848, he tendered all that was due, to the plaintiff's family, at his house, he being absent at the time. In the endorsements upon the contract, of the payments made from time to time by the defendant, the plaintiff had almost uniformly mentioned the payment as having been due on the 1st day of May. And the defendant's counsel insisted that the parties had, by their acts, fixed the times of payment to be on the first days of May, and proposed to show a tender on the 1st day of May, 1848, of the amount then due. The plaintiff's counsel insisted that the payments fell due on the 24th day of December, and that on the 24th of Dec. 1847, there was due \$23,45, and that that amount not being paid the contract was forfeited ; and he objected to the evidence of a tender. The defendant's counsel contended that only \$120 was unpaid on the 1st of May, 1848, and that \$85 of that sum was not due until May 1, 1849. The justice decided that he would receive the evidence, and the plaintiff excepted. The defendant then called Willard Johnson, who testified that on the 1st of May, 1848, he went to the plaintiff's house with \$65 to pay him on the contract in question ; that he inquired for the plaintiff, and was told by his family that he was not at home—that he had gone east somewhere, for money ; that the witness took out the money, and counted it out and put it on the table ; it was in American half dollars ; that the plaintiff's wife was in the room when the witness first went there ; that she was told by one of her sons that she must not stay in the room, and went out ; that they refused to take the money ; that the witness told them the money would be at his father's house and the plaintiff could call there and get it ; that the first time the witness saw the plaintiff he told him the money to apply on the contract was at his father's house, and he could call there and get it, at any time ; and that the money was left by him at his father's accordingly, and still remained there in tender. Hull, another witness, testified that one or two days previous to the 1st of May he went to the plaintiff's house

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to make a tender, but the family were not at home, and he could not obtain admittance; that he saw the plaintiff, soon after his return from the east, about the middle of May, and told him the money was ready for him, on the contract, at Mr. Johnson's; that the substance of his reply was that he should not take the money. The plaintiff proved the making of a demand of the amount claimed to be due from the defendant, on the 15th of March, 1848, and the service of a notice upon him dated May 24, 1848, declaring the contract at an end, and demanding an immediate surrender of the premises.

The evidence being closed, the plaintiff's counsel insisted that by the terms of the contract the payments fell due on the 24th day of December, and that inasmuch as the defendant had failed to pay the amount due on that day, and a demand had been made on the 15th day of March, of the amount due, and the possession of the premises had been demanded before the first day of May, the defendant was apprized of the plaintiff's claim, and that the contract was forfeited because the amount due on the 24th day of December was not paid. He also insisted that the tender should have been made to the plaintiff or to his attorney Mr. Crombie, who held the contract, and that the tender proven by the witness Johnson formed no defence. The justice decided that the parties, by their acts, had fixed upon the first day of May as the time of payment, and that under the circumstances proven he would hold that the tender proved by Johnson was good and constituted a defence; it being conceded by the plaintiff's counsel that no more than the amount tendered by Johnson was then actually due by the terms of the contract. And the justice directed the jury to find for the defendant. To which decision and direction the counsel for the plaintiff excepted. Whereupon the jury, under such direction of the court, found a verdict for the defendant. And the plaintiff, upon a bill of exceptions, moved for a new trial.

J. Crombie, for the plaintiff.

H. A. Foster, for the defendant.

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By the Court, GRIDLEY, J. The plaintiff sought to recover in ejectment a farm, which he had sold to the defendant by contract, on the ground that the latter had failed to pay, when due, a small balance of the purchase price of the premises. The justice who held the circuit granted a nonsuit at the trial, which the plaintiff now moves to set aside. And two questions arise upon this motion.

First. Whether the annual pay day, under the contract, fell on the 24th of December or the first of May. The phraseology of the duplicates of the contract differed somewhat in one particular. If that difference is material, then, we think, in an action against the defendant for a forfeiture of his contract, by reason of its non-performance, we should follow that copy which was in the defendant's hands and by which he was governed in making his payments. Both copies bear date on the 24th of December, 1841; and the clause providing for the payment of the purchase price and interest is in the following words: "One hundred dollars on the date hereof, one hundred dollars by the first of May next, *and the residue to be paid in annual payments of one hundred dollars each*, with interest on the whole sum unpaid from the date hereof." Now the plaintiff contends that the "residue" is payable in annual payments from the *date*, while the defendant insists that the annual payments should be computed from the first of May. And this we think the fair construction of the contract. Throwing out of our consideration the clause providing for the payment of interest, (which on a careful reading appears to have been inserted to show *when* the interest should begin to run, and not to fix the periodical times of payment) there is nothing in the language used to indicate that the periodical payments were to date from the 24th of December rather than the first of May. Indeed the first of May is the last antecedent to which those payments would most naturally refer. Again; in the purchase of farms, possession is usually taken in the spring, and the payments are made to fall due then. It is also true that the first payment was paid down, and strictly was not a future payment secured by the contract. The execution of the agreement and the pay-

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ment of the first hundred dollars were contemporaneous acts. We can see no reason why a payment should have been required to be made in May at all, if all the rest of the purchase money was to be paid in annual installments from the date of the agreement. It seems more reasonable to suppose that all the installments were to fall due on the first of May, except what was paid down, which was in no sense a *future installment*. We are corroborated in this construction of the agreement by the practical interpretation given to it by the parties. They have shown that they understood the annual payments of principal and interest as falling due on the first of May. That has been the practical payday, as is manifest from the receipts endorsed on the contract. We therefore hold that the defendant has not forfeited his rights under this contract by an omission to make his payment on the 24th of December instead of the 1st of May.

Secondly. The remaining question is, whether the judge erred in holding the tender, on the 1st of May at the house of the plaintiff, a good tender. A tender, at the house, of moneys due upon a mortgage, was held good, in a case where an offer was made to the mortgagee, several days before the payment fell due, and she then declined to receive it, but said that she should be back from a place which she named, about 40 miles distant, before the day of payment. She did not in fact return by the day, and the tender at the house was adjudged valid. This case, (*Smith v. Smith*), is reported in the 25th Wendell, 405, and a note of it is also found in 2 Hill, 351, where it is said that Judges Bronson and Cowen agreed to the decision under the particular circumstances of that case; though, as a general rule, the tender should be to the person. We think, if the tender was good in that case it is in this. Here, an ineffectual attempt was made to find the plaintiff, on the last day of April, his house then being closed. On the first of May the defendant's agent got admitted into the house, but was told that the plaintiff *had gone east*. From the state of the negotiations between the parties, and from what the plaintiff knew of the defendant's claim, as to the true payday under the contract, it cannot be doubted that the plaintiff is to be chargeable with no-

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tice that the money would be offered on the first of May. He was voluntarily absent, and, as is conceded, out of the county at the time; and the conduct of his family, in refusing to receive the money, and of his wife, in particular, fleeing from the room, warrants a fair inference that the plaintiff intended to render it impossible for the defendant to make a valid payment on that day, and thus produce a forfeiture of his contract. Under these circumstances, should not a tender *at the house*, (the plaintiff being out of the county,) be held good, under the decision in *Smith v. Smith*? We think it should. In that case the mortgagor *might* have sent 40 miles and made a personal tender; as he was informed of the place to which the mortgagee had gone; but in this case all that could be ascertained by the defendant was that the plaintiff had "*gone to the east*." The defendant then could save his forfeiture in no way but to tender at the house. He did so: and left word with the family where the money would be deposited. The plaintiff was personally informed of this, after his return home; but he refused to receive the money, and insisted that the contract was forfeited; and this after all but a small balance of what remained due had been paid at different times during a period of six or seven years; and that small balance had been tendered at his house.

For these reasons we are of the opinion that neither law nor justice requires the nonsuit to be set aside.

New trial denied.

SAME TERM. *Before the same Justices.*

MUNSON and others vs. HUNGERFORD and others.

A stream, in which the tide does not ebb and flow, and which is not navigable for boats, or vessels, or rafts, and has not been declared a public highway by statute, is not a *navigable* stream, within the meaning of the authorities, so as to subject it to the use of the public, but is altogether private property.

And if a mill dam, situated upon a stream of that description, is injured by throwing saw-logs and spars into the stream and floating them down over the dam, the owner of such dam may sustain an action for his damages.

A stream, to be "navigable" so as to be considered a public highway, must furnish a common passage for the public; must be of common or public use, for the carriage of boats and lighters; and must be capable of bearing up and floating vessels for the transportation of property conducted by the agency of man.

A prescription presupposes a grant. Therefore that defence is not applicable in a case where there can be no grantee.

The right to float logs in a stream, for two or three weeks of the year, during the spring freshets, in such a manner as to endanger and seriously injure the dams and factories and mills thereon, can not be made the subject of a dedication to the public; such a right not being, in any sense, a *public right*, which can, from the nature of the case, be enjoyed by the public at large.

User, alone, is not enough to establish the fact of a dedication to the public; except in the case of streets and public ways.

THIS was an action on the case, tried at the Jefferson circuit in December, 1848, before Justice ALLEN, when the jury found a verdict for the plaintiffs for \$250. The defendants having filed a bill of exceptions, moved for a new trial. All the facts necessary to an understanding of the decision are stated in the opinion of the court.

C. P. Kirkland, for the plaintiffs. I. It is conceded that the defendants, by running or floating their logs in the Black river, caused the injury to the dam of the plaintiffs, as alledged in their declaration. II. The Black river not being navigable for boats, rafts, or water craft of any kind, and not being subject to the ebb and flow of the tide, is in no sense a highway. (6 *Cow.* 518. 20 *John.* 90. 6 *Conn.* 543, note. 5 *Wend.* 423. *Ang. Wat. Courses*, 201, 2, 205, 6. 3 *Caines*, 307. 10 *John.* 236.

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1 *McCord*, 580. 2 *Conn. Rep.* 481. 3 *N. Hamp. Rep.* 321. 3 *Greenl.* 269. 5 *Pick.* 199. *Laws of 1810*, p. 106. *Id. of 1811*, p. 118. *Id. of 1812*, p. 588. *Id. of 1815*, p. 223. *Id. of 1821*, p. 97. 3 *R. S.* 262, 1st ed. *Id.* 248 to 280, 2d ed.) III. It could not be made a highway, even by legislative act, except for public purposes; and not then without providing compensation to riparian and other owners for injuries done by its being used as such highway. (5 *Wend.* 423.) IV. The occasional acts of individuals, in floating logs on the river, as stated in the bill of exceptions, created no *rights* in the defendants by usage, custom, prescription or otherwise. Such acts did not, and could not, convert this innavigable stream into a public highway, and they could not give the defendants a *right* to destroy the plaintiffs' property with impunity. (17 *Wend.* 568.) (1.) These acts were a trespass, unlawful and unauthorized. (2.) They were not acquiesced in. The right was disputed and denied. (3.) No exclusive enjoyment, that is, exclusive of the dam-owners, is pretended. (6 *East*, 208. 17 *Wend.* 568.) (4.) The right claimed is to throw in logs and let them *float at random*; not the right to navigate a stream by *water craft*. (5.) No enjoyment by the defendants, or those under whom they claim, for twenty years, is pretended. And no acts of others, whether acquiesced in or not, for that or any other length of time, could give the defendants a right. (*Jac. Law Dic. tit. Prescription.*) (6.) No right by prescription, custom, &c. can arise to use a stream for a small part of a year, or only in certain stages of the water. (7.) The very nature of the alleged use limits its enjoyment to a small number, and prevents the acquiring a right by prescription. The use alleged is the throwing in and floating of logs, and of course is confined to a few persons. (8.) On account of the great number of riparian and dam-owners, the great value of the privilege liable to injury, &c. no grant can be *presumed*; and no legislative act can be presumed, as any such act would be void: the property being private property, and its use being claimed for private, not public purposes, and compensation not being provided. (*Angl.* 76. 2 *Hill. Abr.* 178 to 187. 1 *Dane's Abr.* 615. *Parker v.*

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Footnote, 19 *Wend.* 309, 319.) For these reasons the rulings and charge of the judge were right; and the motion for a new trial should be denied.

J. Moore, Jun. for the defendants. I. By twenty years or a large number of years, even less than twenty years, continuous uninterrupted usage of a stream, in a particular manner conducive to the public interest and convenience, as in rafting or floating of timber or logs, the public will acquire a right to continue such use in the manner and to the extent of such continuous usage. (10 *John.* 236. 13 *Wend.* 355, 357, 368, 370. 3 *Caines*, 308, 316, 312, 319. 17 *John.* 195, 212, 198. 5 *Mann. & Grang.* 613. 20 *John.* 90. 6 *East*, 208. 6 *Conn.* 538, and note. *Ang. Wat. Courses*, 199, 207. 5 *Pick.* 199. 21 *Id.* 344. 3 *New-Hamp. Rep.* 321. 10 *John.* 380. 3 *Durn. & East*, 159. 16 *Wend.* 531. 1 *Bos. & Pull.* 402.) II. The justice erred in overruling the defendants' offer to prove that there was an immense quantity of timber growing up the Black river on the banks thereof and lands adjacent thereto, and that the ordinary market of the same is by floating down said river by way of Dexter, and thence to Montreal and Albany; as the evidence would have shown that the public interest and convenience would be promoted by the maintenance and exercise of the right. (10 *John.* 236. 3 *Caines*, 308, 319. 17 *John.* 195.) III. The evidence given on the trial by the defendants proved the existence of the usage and right to float and run saw-logs on the Black river set up in the notice accompanying the plea, for a period and under circumstances long enough to confer that right upon the public generally. (*Same authorities as under first point.*) IV. There is no reason for a distinction between the acquisition of the right to float and run rafts and cribs of timber in an innavigable stream, by usage, and the running of saw-logs on the same stream; and no such distinction is stated or can be found in the books. (5 *Mann. & Gran.* 613. 17 *John.* 195, 198, 212.) V. There was evidence given, tending to establish the right to float and run saw-logs down the Black river, and over the plaintiffs' dam, and should have been submitted to

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the jury, and would have warranted them in finding the existence of such a right. And the justice erred in declining so to submit the same, and in charging the jury that there was no evidence that the same was a public highway so as to entitle the defendants to float their logs down the same in the manner described by the witnesses.

By the Court, GRIDLEY, J. This case comes before the court upon exceptions taken to the ruling of the justice on the trial of the cause. The plaintiffs' claim, as stated in their declaration and proved on the trial, was founded on injuries done to their mill and factory dam, which were situated on the Black river at Brownville in the county of Jefferson. These injuries were effected by means of large quantities of saw-logs thrown into the stream between the years 1842 and 1846, to be floated down, which were driven with great violence, by the floods, and dashed against the dam, in such a manner as to displace the timbers and tear up the foundations of the structure. The defendants claimed a right to navigate the river by floating logs upon it in the manner described by the witnesses, notwithstanding the exercise of that right might involve the destruction of the property of individuals, invested in mills and factories, which depended upon dams for their supply of water. It was insisted that this right of floating logs had been acquired by long continued usage and had become a public servitude, in subordination to which the riparian owner must consent to enjoy his private right to the use of the water flowing in the stream. The bill of exceptions states that after the testimony was closed the justice, among other things, charged the jury "that there was no evidence that the river was a public highway so as to entitle the defendants to float their logs down the river, in the manner described by the witnesses, to the prejudice or damage of the plaintiffs' structure at Brownville; and if they had done so, and in so doing had injured the dam of the plaintiffs, they were liable to respond in damages for such injury; to which charge the defendants excepted.

The first question presented for our consideration is whether

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the Black river, between Carthage and Brownville, a distance of about 34 miles, over which the defendants floated their logs, is a *navigable stream*, or in other words is entitled to be considered a public highway for the purpose of floating logs upon it. Streams of water have been divided into several distinct classes. 1. Arms of the sea, in which the tide ebbs and flows. These belong to the public. 2. Streams which are navigable for vessels, boats, lighters, and as it has also been held, for rafts. In these the people have the right of eminent domain for the purposes of navigation and commerce; and the riparian owner has only a qualified right to the bed of the stream, and the water which flows over it, subordinate to the superior rights of the public. To this class may, perhaps, be added such streams as have been declared by statute to be public highways. 3. Streams which are so small, shallow or rapid, as "*not to afford a passage for the king's people*," as Lord Hale expresses it; such streams as are not navigable for boats or vessels or rafts. These are altogether private property. The Hudson river has been said to furnish an example of each of these classes of streams, in different parts of its course. That part of its course in which the tide ebbs and flows belongs exclusively to the public. Another portion is navigable for vessels and boats; and in that the riparian owner holds a qualified property subject to the public use. Another portion higher up is not navigable at all, and *that* is private property. (*See Angell on Water Courses*, 206; *Hale's Treatise "De Jure Maris,"* ch. 3; 3 *Caines' Rep.* 318; 17 *Wend.* 572; 17 *John.* 209.)

The tide does not ebb and flow in the Black river; and it has never been declared a public highway by statute. It therefore only remains to inquire whether it is *navigable*, within the meaning of the authorities, so as to subject it to the use of the public. The witness Watson, at folio 12 of the bill of exceptions, describes the only part of the river concerning which it is necessary to inquire, in the following words: "The fall from Carthage to Dexter is 400 feet. The bed of the stream is principally rock; and where I have been in sight of the river it shows rock within the distance that saw-logs and spars have

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been run on it, that is from Carthage to Dexter. It is not navigable for floating boats or rafts, and has never been used for floating boats or rafts since my knowledge of it. The distance from Ferret's bridge, near Carthage, to Dexter, is about 30 miles, and to Brownville about 34 miles, and in that distance there is not one mile of still water except what is made by dams. I think a boat or raft would be broken to pieces on coming down the river." This is evidence furnished by the defendants themselves, and in my judgment it is conclusive upon the question, whether this is a navigable stream. A stream, to be "*navigable*," within the authorities, (17 *John*. 209, 210, 211,) must furnish a "*common passage for the king's people*," must be of "*common or public use for carriage of boats and lighters*," must be capable of bearing up and floating vessels for the transportation of property, conducted by the agency of man. It is not enough that a stream is capable, (during a period in the aggregate of from two to four weeks in the year when it is swollen by the spring and autumn freshets,) of carrying down its rapid course whatever may have been thrown upon its angry waters to be borne at random over every impediment in the shape of dams or bridges which the hand of man has erected. To call such a stream navigable in any sense, it seems to us is a palpable misapplication of the term. If we are right in our conclusion upon this point, there is no error in the charge, and a new trial can not be granted on that ground. The defendants' counsel *might* have called upon the judge to express his opinion to the jury on the effect of the alleged usage to float logs in the manner complained of by the plaintiffs, admitting the Black river not to be a navigable stream; but he *did not*, and therefore that question is not raised on this bill of exceptions.

But as that question might have been raised, and as it may hereafter be raised in a future suit, we will proceed to express our opinion upon it. The defendants rely mainly on the case of *Shaw v. Crawford*, (10 *John*. 236.) That case was not very accurately considered, as is inferable from the remarks of Judge Spencer in the case of *The People v. Platt*, (17 *John*. 211,) and it was put on the ground that the stream was navigable for

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rafts, and that the usage had existed for 26 years. It is now conceded by the counsel for the defendant that he cannot successfully claim the right in question by *custom* or *prescription*. The defendants have used the river for floating logs only some ten years, and of course can not prescribe for themselves; and as a prescription supposes a grant, that defence is not applicable in a case where there can be no grantee. (*See 22 Wend. 440 to 444; 20 Id. 121 to 125; 2 John. 357.*)

The ground, therefore, on which the defendants are compelled to rely, is that of a dedication by the riparian owners of the stream to the public, for the use and purpose of floating logs for two or three weeks of the year, during the swollen freshets, over the rapid current of the Black river, in such a manner as to endanger and seriously injure the dams of factories and mills scattered, to the number of a dozen or fifteen, all along the course of the river, from Carthage to Dexter. Upon this branch of the case two questions arise; (1.) Whether the right to float logs in the manner described can be made the subject of a dedication to the public. (2.) Whether there is sufficient evidence in the case to establish the fact of such dedication.

1. Can the right claimed by the defendants be made the subject of dedication to the public? I refer to the 6th Hill, 411, and the 22d Wendell, at page 472, to show what a public dedication is, and the legal grounds on which the principle rests. In the case of *Hunter v. The Trustees of Sandy Hill*, (6 Hill, 411,) Justice Beardsley enumerates the purposes to which lands may be dedicated; and Justice Cowen, in an elaborate opinion which he delivered in the case of *Pearsall v. Post*, (20 Wend. 115,) held that land could not, by a user of any length of time, be dedicated to the public use of landing deposits from vessels; and laid down a rule which confines such dedication to streets and highways, commons, squares, and land dedicated to charitable and religious uses. That decision was affirmed in error. And the chancellor, in delivering his opinion in favor of an affirmance of the judgment, in the court of errors, uses this language: "But a public place for landing and depositing manure, must from its very nature be confined to a very few individuals,

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and would generally be permitted as a mere neighborhood accommodation, while the owner of the land on which it was deposited had no immediate use for the premises himself." "I think it would be most unreasonable to apply the principles of a public dedication to such a case." (22 *Id.* 434.) So it may be said that the principle claimed by the defendants must be confined to a few individuals—the owners of lands on the Black river, and the owners of some four or five saw mills at Dexter. It is in no sense a *public right* which can, from the nature of the case, be enjoyed by the public at large. Again; it can only be enjoyed for a few days in the year, and that when the river is swollen by foreign contributions to five times its usual size. It is moreover a dedication against the public interest, unless we suppose the facility of transporting logs to the saw mills at Dexter more important to the public than the mills, iron works, factories and other erections which are scattered along some thirty miles of a river, that in water privileges has few rivals in the state. For it is a question of paramount right between the lumbermen and the dam-owners; and a decision in favor of the former decides the question of right not only against all present owners of hydraulic works, but against all riparian owners who in the progress of time may claim to avail themselves of hitherto unappropriated water privileges. It seems to us that the argument need not be extended to show that the privilege claimed by the defendants can not well be made the subject of a public dedication.

2. We also think the evidence did not establish the existence of such a dedication. It was held by Senator Verplanck, in the 22d Wendell, 474 to 483, that *user alone* is not enough to establish the fact of a public dedication, except in the case of *streets and public ways*. I will only refer to the opinion of the distinguished senator, which is certainly an able vindication of the doctrine he attempted to establish.

In the case before the court, the number of persons who had floated logs upon the Black river during the last thirty years has been very small, and the exercise of this right has neither been uninterrupted nor acquiesced in by the owners of dams on the stream. In truth it might as well be claimed that the own-

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ers of half a dozen contiguous farms, who had acquiesced in the drawing of loads over their premises for a few days in each winter, when the injury would be slight, would lose the absolute right to their lands, if they should happen to submit to such trespasses for a period of twenty years.

There was an exception to the refusal of the judge to receive evidence of the amount of timber, &c. on the bank of the Black river. It can not however be necessary to discuss this question; for if we are right in the conclusions to which we have come on the other branches of the case, this evidence can not amount to a defence.

New trial denied.

SAME TERM. *Before the same Justices.*

T. and E. BELLINGER vs. KITTS.

In expounding a written instrument, the antecedent and surrounding circumstances are competent evidence, for the purpose of placing the court in the same situation, and giving it the same advantages for construing the instrument, as is possessed by the parties who executed it.

K. and B. entered into a written contract, by which K. leased a farm and personal property to B. for one year, at a specified rent. And it was covenanted and agreed by K. that in case B. should "*at any reasonable time*" pay to K. the interest on the money paid by K. towards the property, and secure the said purchase money, he would deed and convey such property to B. Under this agreement B. continued in the possession and occupation of the property, paying the stipulated rent, for several years; the agreement being continued from year to year by implication. On a bill by B. against K. to compel a specific performance of the contract to convey the property to him; Held that the "*reasonable time*" within which B. had the right to pay for or to secure the payment of the purchase price, and to have a conveyance, did not expire with the current year after the date of the contract; but that the rights of the parties were to be adjudged as though a new agreement, with the clause concerning the sale of the property, had been made each year, or at the expiration of the period covered by the preceding one; especially as K. had stood by and seen the farm rendered more valuable by permanent improvements, without setting up any

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claim that the condition conferring on B. the right to purchase had become forfeited.

Held also, that the execution of the new agreement between the parties, omitting the clause giving to B. the right to purchase the property, did not cut off the right of B. to avail himself of that provision in the former agreement, where it appeared that, so far as that provision was concerned, the old contract was, by the express agreement of the parties, still to remain in force.

The cases in which a legal tender is indispensable, notwithstanding a refusal to receive the money, and a general refusal to perform the contract, on other grounds, are very few. *Per GRIDLEY, J.*

The general rule is that a strictly legal tender may be waived by an absolute refusal to receive the money; on the principle that no man is bound to perform a nugatory act.

Where there is a mutual obligation on a purchaser to pay or secure the purchase price, and on the vendor, to convey the property purchased, an offer and readiness to perform, on the part of the purchaser, is enough; especially where the vendor refuses to convey at all.

IN EQUITY. The bill in this cause was filed to enforce the specific performance of an agreement for the sale and conveyance to the plaintiffs of real and personal property. The cause was heard upon pleadings and proofs. Most of the material facts are set forth in the opinion of the court. The bill alleged that the personal property bid off by the defendant at the sheriff's sale and leased by him to the plaintiff, was appraised by two men at \$800, and that the land was worth \$4250. The defendant, in his answer, denied that the land was worth that sum, and insisted that it was not worth more, now, than \$3500, and that in consequence of the rise of land in that locality it was worth several hundred dollars more now than it was at the time of the mortgage sale. The plaintiffs alleged that they had offered to sell the personal property to the defendant at \$800; and that they had offered to execute to him a bond and mortgage on the premises for \$1996, the balance due to him; or if the defendant would prefer it, that they would keep the personal property at \$800, and would execute to him a bond and mortgage, free from incumbrances, on the premises, for the sum of \$2796, and interest from March 13, 1848, and to pay him a reasonable sum, in addition, for his trouble in the premises; all of which offers the defendant refused to accept. And

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that the defendant absolutely refused to suffer the plaintiffs to redeem the land or personal property, or any part of it. The bill also alledged that on the 24th of March, 1848, Dayan and Knox, the plaintiffs' agents, or one of them, made several propositions in writing to the defendant for an adjustment of the matters between the parties, all of which were rejected; that they then asked the defendant if he would accept the specie for the amount due to him, in case such agents would go into the bank and get the same and tender it to him; that the defendant answered that he would not take the money if it was tendered, as he did not consider himself obliged to do so. The bill also alledged that the plaintiffs had often requested the defendant to reconvey to them the said personal property and premises so bid off by the defendant, on their paying or securing to be paid the amount due, with interest, and a reasonable compensation for trouble, &c. which the defendant had refused to do.

C. P. Kirkland, for the plaintiffs. I. The verbal arrangements and agreements in relation to the purchase of the personal property in April, 1841, by the defendant, constituted him practically a *mortgagee* of that property; and the plaintiffs had the right of redemption. (8 *John*. 96. 9 *Wend*. 227, 232. 2 *Cowen*, 324, 331, 246. 15 *John*. 205, 555.) II. The circumstances and arrangements under which the defendant bid in the real estate at the mortgage sale in October, 1841, created the relation of mortgagee and mortgagors between the defendant and the plaintiffs in every practical and equitable sense. (*Same cases*.) III. Emphatically, the written instrument of May, 1843, created that relation both as to the real and personal property; or, what is precisely equivalent for all practical purposes, that instrument created the relation of vendor and vendee. IV. The taking the instrument (or lease) in March, 1847, did not destroy or affect the relation then existing between the parties; but on the contrary, that relation and the instrument of May, 1843, were left in full force and effect. V. The defendant, by receiving frequent payments pursuant to and upon the

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instrument of May, 1843, has affirmed it, and has waived any forfeiture that might have arisen from non-payment at the day. Indeed, he does not set up in his answer any ground of forfeiture or non-performance on the plaintiffs' part. (11 *Paige*, 352.) VI. On the strength and faith of their right to redeem (or to pay the purchase money) the plaintiffs have made improvements and expenditures on the property: and would be grossly defrauded, if the defendant were permitted to repudiate his agreement. VII. The plaintiffs have in good faith performed on their part: and they have made all the requisite tenders and offers on their part to entitle them to call on the defendant for a conveyance of the property, real and personal. VIII. By the conduct and engagements of the defendant other persons were induced not to bid at the sales: a palpable fraud would be committed both on the plaintiffs and on those persons, if the defendant were now permitted to refuse to convey to the plaintiffs. IX. The defendant, if the defence he sets up is successful, would make a clear gain to himself and a clear loss to the plaintiffs, of at least \$2500, and would thus be enabled to perpetrate a flagrant wrong and oppression. X. The plaintiffs have established their right to a conveyance of the real and personal property; and the defendant having inequitably resisted a just demand, should be decreed to pay costs.

V. R. Martin, for the defendant. All negotiations or agreements between the parties in relation to the premises and personal property in question were merged in the agreement of May 3, 1843; and from that date the rights of the parties were what the written instrument defined them to be. By the fair construction of that instrument the plaintiff could only require the conveyance of the property within one, or at the extent, two years from its date. The "reasonable time" mentioned was intended to be limited to the period of the lease. The fact that the plaintiffs were suffered to remain in possession after the lease expired, gave them no further rights. The evidence of the witness Knox, showing a parol agreement that the clause in the old writing, providing for a conveyance, should remain in

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force, made at the time of the execution of the lease of March 13, 1847, was inadmissible, and should be excluded. The fact is also fully disproved by the circumstance that a similar clause in the last lease was stricken out before the defendant would sign it, and by the positive testimony of Nelson Kitts. At all events, the fact that the defendant refused to execute the last lease with a clause giving the plaintiffs a right to a conveyance, was notice to them that he should not regard himself as any longer obligated to convey to them. If the plaintiffs had not lost the right to tender the money or security and require a conveyance previous to the execution of the second lease, it was too late to do so on the 24th of March, 1848. The authority of Dayan and Knox to make a tender or offer to the defendant was not sufficient. Nor was the defendant notified in any manner, that they had any authority to make the offer and receive a conveyance. The offer of March 24, 1848, was therefore insufficient. The offer was not a fair and *bona fide* offer on the part of the plaintiffs, and was therefore insufficient. The amount offered was not as much as the defendant's debt against the plaintiffs, in consequence of an error in the receipt of January 13, 1845. There is no equity in the case entitling the plaintiffs to relief. The property was originally purchased by the defendant at a price but little if any less than its cash value, and if to the principal be added an adequate rent of the property, it will bring the amount of the defendant's claim to the full value.

By the Court, GRIDLEY, J. This cause comes before the court upon pleadings and proofs, on a bill filed to compel the specific performance of a contract to convey to the plaintiffs a certain farm situated in Lewis county, together with a large quantity of personal property. The bill charges that in the year 1840 the defendant bid off the farm at \$2000, on a mortgage sale; and also a large quantity of stock, farming utensils, and other property then on the farm, at a sale upon an execution against the plaintiffs. And that this purchase was made in pursuance of a verbal agreement to allow the plaintiffs to continue

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in the possession of the said farm and personal property, by paying the interest on the auction price of the same; and ultimately to redeem the property by paying up the principal sum paid by the defendant on his purchase, and the interest on the same.

We think this agreement abundantly proved; but we shall spend no time upon this part of the case, because the rights of the parties depend on certain written agreements subsequently made, which are set out in the pleadings, and concerning which much testimony has been taken. The most that can be made of the large mass of testimony concerning the relative situations of the parties, the condition and value of the property purchased by the defendant, and the mutual acts and declarations of the parties concerning the same, is to aid the court in the construction of the agreements on which the plaintiffs' claim to relief in this action must of necessity depend. That these antecedent and "surrounding circumstances" are competent evidence to place the court which is to expound a written instrument, in the same situation, and to give such court the same advantages for construing the instrument, as is possessed by the parties who executed it, is the settled law of the land. (2 *Cowen & Hill's Notes*, p. 1399, citing *Wigram on Extr. Ev.* 59, 138.)

On the 3d of May, 1843, the parties entered into a written contract under their hands and seals, by which the defendant, in consideration of \$2600 and of the covenants contained in the said instrument, leased the farm and personal property to the plaintiffs, for one year, at a rent equivalent to the interest on the sums at which the defendant bid off the same. This agreement also contained the following clause: "It is further covenanted and agreed by and on the part of the said Kitts, that in case said Bellingers shall, *at any reasonable time*, pay to said Kitts, or secure to him all the interest on the money paid by him towards said place and personal property, and secure the said purchase money, *he shall deed and convey to them the said land and personal property*. The said personal property shall be made to be as valuable and appraised and made equal to what it was worth when purchased—and if not, it is to be made

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good by said Bellingers, at the expiration of this lease." The plaintiffs continued in the possession and occupation of this property, both real and personal, paying the stipulated interest and making permanent improvements upon the farm, until the 13th of March, 1847; when the exact sum which was due for principal and interest was ascertained, and a new agreement was executed between the parties, in which the consideration was stated to be the sum of \$2796 instead of the sum of \$2600 which had been assumed in the first contract, without a calculation; and omitting the covenant to sell. Otherwise this agreement was like the first.

Upon this state of facts the counsel of the defendant contends, 1st, that the *reasonable time* within which the plaintiff had the right to pay for or to secure the payment of the purchase price of the property, and have a conveyance, expired with the current year after the date of the contract. Granting that this would be so, if the occupation had ceased with the year, I can not admit that this consequence will follow when this original agreement was by implication continued from year to year until the execution of the new agreement in 1849. The rights of the parties are to be adjudged as though a new agreement, with the clause concerning the sale of the property, had been made each year, or at the expiration of the period covered by the preceding one. This should certainly be so held, in a case where the defendant has stood by and seen the farm rendered more valuable by permanent improvements, without interposing any notice of a claim that the condition conferring on the plaintiff the right to purchase had become forfeited. 2dly. The counsel also contends that the execution of a new agreement, omitting the provision giving the plaintiffs a right to purchase, cut off all right on the part of the plaintiffs to avail themselves of the condition in the former agreement. On the other side it is insisted that, so far as this condition is concerned, the old contract remains in force, by the express agreement of the parties; and that Mr. Knox, the depositary of the agreement, was specially directed by the parties to hold the old agreement, leaving it, so far as the covenant in question is concerned, a subsisting and

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valid contract between the parties. This leads us to examine the testimony upon this point. The witness Knox, who had been the mutual agent of both parties; who had drafted both agreements; and who had been present and heard all the negotiations between them, has given a very minute and particular account of the entire transaction. He at first prepared the second agreement with the clause in question inserted in it; whereupon it was objected to by Kitts, on the ground that he did not wish the agreement to contain the words "*executors, administrators and assigns*," for the reason that he did not intend to give the plaintiff a right to sell the place to any one else—still assuring them that he did not intend to object to their paying or securing him what he had paid, and receiving a conveyance of the property; using the significant expression "Farmer Jake [meaning himself] will not hurt a hair of your heads, boys." He did not object to the covenant as he understood it to be expressed in the first agreement; and both parties directed Knox to hold the old agreement, as evidence of that portion of it which was not abrogated. It is true that Nelson Kitts, the defendant's son, understood the conversation differently, in some respects. But this young man, when he comes to state the objection which his father made to executing the last instrument as it was at first written, states it substantially as Mr. Knox does. He may not have heard the entire negotiation. Mr. Knox did, and the young man may not have understood the conversation in all its parts as Mr. Knox must have done. *He* may be mistaken; Knox cannot. Knox swears *affirmatively* and *positively*; and if he swears untruly he does so intentionally, and is guilty of perjury. And there is no possible motive that, on these papers, can be assigned for the commission of such a crime; while a strong motive exists to induce young Kitts to defeat the plaintiffs' claim, viz. an arrangement by which he is to have the farm himself. This he is compelled to admit on his cross-examination. For these reasons we give credit to Mr. Knox; and therefore hold the old agreement to sell and convey still binding on the defendant, notwithstanding the new lease does not contain the clause giving that right.

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This brings me to a consideration of the only remaining question, which arises upon the tender of the amount due to the defendant and the demand of a conveyance from him.

It is supposed by the counsel of the defendant that a *strict legal tender* was necessary to authorize a decree on this bill; and that a refusal by the defendant to perform his agreement, upon other grounds, would not excuse the production of the money, and the full amount of it, notwithstanding both parties were mistaken as to the true amount, by means of an error in computation, committed by a common agent. To this doctrine I cannot assent. Even if this question were to be tested in a court of law, and by strict legal rules, no such obligation would rest on the plaintiffs. The cases in which a legal tender is indispensable notwithstanding a refusal to receive the money, and a general refusal to perform the contract, on other grounds, are very few. The general rule is that a strictly legal tender may be waived by an absolute refusal to receive the money; on the principle that no man is bound to perform a nugatory act. Here was a mutual obligation, on the plaintiffs to pay or secure the purchase price, and on the defendants to convey the land and personal property. An offer and readiness to perform, on the part of the plaintiffs, was enough; especially when the defendants refused to convey at all. Even performance of a condition precedent need not be averred, where performance was waived, or prevented by the party to be benefited by it. (1 *Chit. Plead.* 318.) But, in a court of equity the strictness required in a court of law is not exacted. That court proceeds upon equitable grounds, irrespective of technical forms. A court whose province it is to relieve against strict legal forfeitures will not cut a party off from his equitable rights on account of an omission to produce the money, when the offer to do so was waived. Nor, when the offer was, by the mistake of the agent of both parties, a few dollars less than the sum due; especially when the refusal was put on no such ground, and when it was a substantial refusal to convey at all. The plaintiffs have been compelled to come into a court of equity to enforce their plain equitable rights. They must therefore have

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their costs. The refusal of the defendant to convey was unjust and inequitable.

It must be referred to a master to ascertain the amount due, with interest, for the real and personal property in question; under the agreement of the parties. And on the payment of the same the defendant must execute conveyances pursuant to the contracts, with covenants against his own acts. And the decree will also provide that unless the money is paid within fifteen days after the confirmation of the referee's report, the bill is to be dismissed, with costs.

SAME TERM. *Before the same Justices.*

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Where S. and G. made a promissory note, payable to the order of N. D. & Co., and before delivering it to the payees, the makers, at the request of N. D. & Co. procured it to be indorsed by B., who indorsed it for the accommodation of S. & G., and for the purpose of giving them credit with the payees; whereupon N. & D. took the note and advanced property thereon to the makers, and subsequently took it up, and indorsed the same to E.; *Held*, in an action upon the note, in the name of E., for the benefit of N. D. & Co., brought against B. "as a party to the note," that B. could not be made liable as *guarantor* or *maker* of the note.)

Held also, that B. was not liable to N. D. & Co., in an action brought upon the note as *indorser* thereon.

A first indorser can not maintain an action against the second, "as a party to the note," either directly or indirectly.

A person who guaranties a note is in no sense a party to the note.

A guaranty is a special contract, and must be specially declared on.

The law will not imply a contract of guaranty when the evidence shows that the defendant undertook to be bound only as indorser.

When parties have agreed upon an express contract, the court will not *imply* one of a different legal effect and obligation. *Per* GRIDLEY, J.

Previous to the indorsement of a negotiable promissory note, the property of the note is in the payees; and until they have indorsed it to some other person and thus transferred the legal title to him, no indorsement by such person will be

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operative as such, or convey any title to the note, so as to enable the holder to sustain a suit thereon, in his own name.

If the payees of a note indorse the same, generally, *after* it has been indorsed by another person, they will be liable as first indorsers, and the other person as second indorser.

In an action by the holder of a note against the second indorser, it is a perfect defence to show that the plaintiff has paid no consideration for the note, but has received it from the payees merely to collect for their benefit.

Although there is a strong analogy between an indorsed note and a bill of exchange, yet an indorsee of an ordinary promissory note can not declare upon it as an accepted bill of exchange, and recover.

MOTION by the plaintiff for a new trial. The cause was tried at the Herkimer circuit in October, 1848. The action was brought by the plaintiff as indorsee, against the defendant as "a *party* to a promissory note," which was declared in the notice subjoined to the declaration, to be "the *only cause of action* on which the plaintiff relies." The note as set forth and as proved on the trial, is in the following words:

"\$330.

Providence, February 1st, 1845.

Six months from date, for value received, we promise to pay to the order of Newell, Daniels & Co, three hundred and thirty dollars, at either bank. (Signed) STONE & GREENE."

(Indorsed) "Orrin Brown.

Newell, Daniels & Co.

It appeared in evidence that the note was made at Newport, Herkimer county, where the makers of the note, and the defendant, resided. Newell, Daniels & Co. were leather dealers, and resided at Providence, Rhode Island. In the month of December, 1844, Stone & Greene, who were also dealers in leather, addressed a letter to Newell, Daniels & Co. proposing to purchase a quantity of hides on their own note at 6 months' credit. In their answer to this proposition Newell, Daniels & Co. promised to furnish the hides, if Stone & Green "would agree to send their note at 6 months indorsed by Orrin Brown." And thereupon the defendant Brown, on the application of Stone & Greene, indorsed the note, which was already drawn and signed by the makers; saying at the time that he had no objection to indorse such a note; for he was really indorsing

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for Newell, Daniels & Co., and he presumed that the latter would not accept the note. There was evidence tending to show that Brown knew that his name as indorser had been required by N. D. & Co., and that he took from Stone & Greene a bill of sale of the hides, for his security; though it appeared that the hides never came into his hands. They had in fact been shipped to Stone & Greene, but had not arrived when the note was made and indorsed and bill of sale executed. Immediately after the indorsement of the note, it was transmitted by Stone & Greene to Newell, Daniels & Co. who, after indorsing their names upon it, procured it to be discounted and received the avails thereof, at the Tradesman's Bank, Providence. Notice of this discount was given to the defendant and to Stone & Greene, and the note not being paid at maturity, the same was protested and taken up by Newell, Daniels & Co., who caused a suit to be brought upon it in the name of the plaintiff, for their own benefit. The hides were manufactured into leather and sent to Newell, Daniels & Co., to be sold on commission. They were thus sold by N. D. & Co. and the proceeds applied upon a prior debt of Stone & Greene. The above evidence tending to show that the name of Brown was placed on the note, with the view of securing the payment of the note to N. D. & Co. was received provisionally upon the trial of the cause by the justice, who, after hearing the whole case, nonsuited the plaintiff, to which decision the plaintiff's counsel excepted.

S. H. Hammond, for the plaintiff.

F. Kernan, for the defendant.

GRIDLEY, J. Upon the facts in this case the question is whether the plaintiff was entitled to recover, or whether the nonsuit was properly granted. In considering this question it must be borne in mind that this action is not brought for *money paid* by the firm of Newell, Daniels & Co. as it manifestly could not be in the name of ~~the~~ present plaintiff, but is instituted

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upon the note itself as the foundation of the action, and against the defendant as a "*party to the note.*"

1. It is obvious, therefore, that the action can not be maintained against the defendant as a *guarantor* of the note. A person who guaranties a note is in no sense a party to the note. (*Story on Prom. Notes*, § 3; 5 *Wend.* 307; 2 *Hill*, 190.) A guaranty is a special contract, and must be specially declared on. (1 *Chit. Pl.* 339.) And it is only where the person called the guarantor has been held by the court to be, in legal intentment, the maker of the note, that a different rule has prevailed. Again; if the indorsement were to be regarded as a guaranty, such guaranty was made to Newell, Daniels & Co., and the action should have been brought in their names, and not in that of Ellis. (See *Lamourieux v. Hewit*, 5 *Wend.* 307; 2 *Hill*, 192.) To this we may add that the law will never imply a contract of guaranty, when the evidence shows, as it does here, that the defendant undertook to be bound only as indorser. (*Seabury v. Hungerford*, 2 *Hill*, 80.) Without pursuing this point farther it may be safely assumed that the defendant is not liable in this action as a *guarantor* of the note.

2. The next question is whether he can be made liable as a *maker*. (Now it is not to be denied that there are cases in which a party *indorsing* a note has been held liable as *maker* of a separate note to be written over his indorsement, and sometimes as joint and several maker of the note on which his name is written; for the purpose of carrying out what was regarded as the *general* intention of the parties, which intention they had failed to express in the written instrument itself. (See 1 *Hill*, 256; 4 *Id.* 421; 3 *Id.* 585, 9; 2 *Id.* 663; 19 *Wend.* 203.) We do not mean to deny, and it is not necessary that we should do so, that it is allowable to write a note over the name of a party when the facts show that it was the intention that he should be bound as a maker. But some of the cases have gone beyond this reasonable rule of limitation; and have held parties liable, not upon the legal interpretation of the instrument they had signed, nor upon any parol contract which they had made; but upon contracts which the courts have made for the parties, to

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remedy the hardship of particular cases. The mischief arising from this loose construction of commercial paper had become so intolerable that the courts have, for some years, been retracing their steps and holding parties to the contract which they themselves have made, according to this legal interpretation. In *Hall v. Newcomb*, (7 *Hill*, 418,) the chancellor, in delivering the prevailing opinion in the court of errors, says, "The courts have gone far enough in repealing the statute to prevent frauds and perjuries, by introducing parol evidence to charge a mere surety for the principal debtor, by showing that his written agreement was something else than what, upon its face, it purports to mean." Again, in 1st Comstock's Reports, 324, the court held this significant language, "There are a few cases in the books which hold, in effect, that a written contract of one kind may be turned into a contract of a different kind, by parol proof concerning the intention of the parties; that the indorser of a promissory note may, under certain circumstances, be charged as *maker* or *guarantor*; and that the guarantor of a promissory note may be sometimes charged as *maker* or *indorser*. Although these cases stand upon no principle, it has been a work of some time and difficulty to get rid of them. The court of errors was at first equally divided on the question, but after a second argument the court decided by a pretty strong vote to uphold contracts as they had been made by the parties, instead of making new contracts for them," citing *Hall v. Newcomb*, (7 *Hill*, 416.) In the case of *Hall v. Farmer & Doolittle*, (not yet reported,) the plaintiff sought to recover against the defendants, who, with the view of securing a debt due to Hall from Kathern & Doolittle, *indorsed* a guaranty on a note made by the latter firm, and payable "to *Luther Hall, to the order of Kathern & Doolittle*." An attempt was made to charge the defendants as *makers* or *guarantors*, for the purpose of carrying out what was supposed to be the general intent of the parties. The court, however, held that the action could not be supported upon the *guaranty*; for the reason that it was void under the statute of frauds, in not expressing the consideration on which it was founded; and that the guaranty could not be

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treated as a promissory note, because a guaranty is in its nature a conditional contract binding on the guarantor only upon the default of the principal debtor; whereas it is essential to the very nature of a promissory note that it should be payable absolutely and at all events.

¶ If these cases be good law, then, notwithstanding the parol testimony should be held to have been properly admitted in this case, to show what contract the parties intended to make, it is quite clear that the defendant can not be held liable as *maker* of the note in question. He was not only an *actual indorser* in fact and by the *legal construction* of the written paper on which the suit is brought, but the letters of Newell, Daniels & Co. as well as of Stone & Greene, show that it was intended by all parties that he should be an *indorser*, and nothing else. (*See the opinions in the cases of Seabury v. Hungerford*, 2 *Hill*, 80, and *Miller v. Gaston*, *Id.* 188.) These cases are direct and conclusive authorities to show that when the parties have agreed upon a contract of a particular kind, by which a demand shall be secured, the courts will not allow a contract of a different kind to be written in lieu of that which the parties have made. In other words, that when the parties have agreed upon an express contract, the court will not *imply* one of a different legal effect and obligation. It is to be assumed, therefore, as an incontrovertible fact that the defendant never contracted to be holden as a joint and several maker of the note in question, with Stone & Greene. And we have already seen that unless he did so he is not a party to *this note*, as maker, and therefore can not be made liable as *maker*, under this declaration. This very question is virtually decided in *Hall v. Newcomb*, (7 *Hill*, 416.) If this suit had been brought in the names of Newell, Daniels & Co. instead of Ellis, the cases would have been alike. So far as the question whether the party who placed his name on the back of the note can be made liable as a *maker* of the note, is concerned, it is unimportant whether the suit is brought in the name of Newell, Daniels & Co. or in that of the plaintiff Ellis. ¶ It may be said in this case, as the chancellor said in *Hall v. Newcomb*, "that when a man writes his name in blank)

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upon the back of a promissory note, he only agrees that he will pay the note to the holder, on receiving due notice that the maker, upon the demand made at the proper time, has neglected to pay it. The case of *Gilmore v. Spies*, (1 Barb. Sup. C. Rep. 158,) affirmed in the court of appeals, (1 Comstock, 321,) is also a direct and conclusive authority that the defendant can be made liable *only* as indorser of the note. The principle decided by the court is laid down in the following explicit terms. "In the absence of clear and direct evidence of an intention to become a joint debtor or guarantor of the note, the party, by putting his name on it, (the note being drawn as a negotiable note,) *can be regarded only in the light of an indorser, and as assuming no other responsibility than that which an indorsement of a negotiable note imports.*" In the case we are now considering we have already seen that there is not only an absence of all evidence that the defendant intended to be bound as a maker, but the most explicit evidence that it was the intention of all parties that he should be bound as indorser. †

3. The only remaining question is, whether the defendant is liable as indorser. On the face of the note, there seems to be no difficulty in sustaining the action. It is the case of an indorsee seeking the usual remedy against his immediate indorser. Newell, Daniels & Co. are the first indorsers, the defendant the second indorser, and the plaintiff the holder of the note. It is however, a part of the case that the note is owned by Newell, Daniels & Co. who took it up at the bank and have prosecuted it in the name of the plaintiff for their own benefit. Unless, therefore, Newell, Daniels & Co. could recover, upon the facts of this case, the plaintiff can not; for he stands in their shoes. The question then comes to this: Whether a prior indorser can recover against a subsequent one. The indorsement of Brown was inoperative, as such, until Newell, Daniels & Co. had indorsed their names upon it. In the language of Chief Justice Spencer, in *Herrick v. Carman*, (12 John. 160, 161,) "the fact of his indorsing first in point of time can have no influence; for he must have known, and we are to presume he acted on that knowledge, that though the first to indorse, his

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indorsement would be nugatory unless preceded by that of the payees of the note." The note was, in legal intendment, the *property* of Newell, Daniels & Co., and Ellis could not derive the legal title to it, so as to sustain a suit in his name, upon it, until they indorsed it. The title did not pass by delivery, as it would have done, had it been payable to bearer, but could only be transferred by indorsement. In the case of *Herrick v. Carman*, (10 *John*. 224,) it was decided that in an action by Carman, the second indorsee, against Herrick, his immediate indorser, on a note executed by "John Ryan to Lawrence, Carman & Co. or order," it was a perfect defence to show that the note was delivered to Carman, the plaintiff, by the payees, as their agent, to collect the same, and without any consideration having passed between those parties. The court say, in the conclusion of their opinion, "The indorser can not sue the indorsee, and this must have been a contrivance to effect that object indirectly." Now this case is directly in point; for here the plaintiff has paid no consideration for the note, but received it from the payees, to collect for their benefit. It is therefore a contrivance by which Newell, Daniels & Co. are indirectly suing their indorsee, the defendant; which the court in that case, say can not be done. That case came before the court again, after another trial, in the 12th of Johnson's Reports, 159. On the second trial it appeared that Carman, the plaintiff, was the owner of the note; having purchased it at a discount, with a full knowledge of all the facts, and *agreeing to take it on his own risk*. Upon this new state of facts, the court hold the following language: "we have already decided that the payees of this note could not, directly nor indirectly, recover on it. The defendant in error having purchased the note with a full knowledge of the facts, has virtually agreed not to resort to Lawrence, Carman & Co., and yet if he can sustain this suit he will in effect violate his agreement; for on this evidence Herrick, if obliged to pay the note, would have his remedy over against Lawrence, Carman & Company." In commenting on this case the chancellor (7 *Hill*, 420) says the payees of the note, who had received it on the credit of Herrick, had themselves made a general indorsement

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instead of a *restricted* one ; so that if Carman recovered against Herrick the original payees would be liable to him as first indorsers. In that case, the chancellor suggested a mode by which the payees of the note might have transferred it, so as to have entitled their indorsee to maintain a suit upon it without incurring a liability on their indorsement. I think the idea was suggested to the chancellor by a remark of Judge Cowen in *Dean v. Hall*, (17 *Wend.* 217.) The expedient is ingenious, and may be consistent with the intention of the parties as disclosed by the parol proof. It is this. Newell, Daniels & Co., when they received the note, should have indorsed it *without recourse*. That would have created a complete chain of legal title to the note, and would have enabled any bona fide subsequent holder to recover against the defendant without subjecting the payees of the note to an action at his suit. Now whether this expedient might have been successfully resorted to by Newell, Daniels & Co., it is not necessary for us to decide; for they did not pursue the chancellor's advice. They made a *general indorsement* of the note; the legal construction of which makes them liable as prior indorsers to the defendant. And that has been twice held to be a fatal objection to a recovery either directly or indirectly, by the payees against their indorsee. It is true that the court threw out a dictum in *Herrick v. Carman*, in relation to the liability of a party thus situated, if sued as *maker* or *guarantor*. But that a subsequent indorser could not be made liable on the contract implied from his indorsement, the case of *Herrick v. Carman* is an explicit authority, and is regarded by the chancellor as conclusive, in a case where the indorsement was general and absolute, and the action brought on the note, upon the contract which the law raises upon the naked indorsement of the indorser's name.

It is true that this point would have been a fatal objection to the right of the plaintiff to recover, in *Spies v. Gilmore*; and it is equally true that it is not mentioned in the report of the case either in the supreme court or in the court of appeals. This omission may perhaps be accounted for by a remark at the close of the opinion of Judge Bronson. He says that the

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cause was tried in the superior court on the doctrine, afterwards exploded, that Gilmore might be made liable as a maker or guarantor of the note. When the cause of *Hall v. Newcomb* was decided that ground failed; and the plaintiff was forced to make out the defendant's liability as an indorser, or be beaten.

There having been no demand or notice, in a case where the law required both, as a condition of the defendant's liability, it was unnecessary that the defendant should do more than to place his defence upon that conclusive ground. That ground was held to be sufficient, by the court of appeals, and I think no inference should be drawn from the silence of the judges upon a point not raised by counsel. The courts have not enjoyed sufficient leisure, of late, to discuss questions not raised by counsel, when they are able to place their decision upon other conclusive grounds that have been fully argued.

We have been reminded of the analogy between a promissory note after it is indorsed and an inland bill of exchange. And it is said that the defendant may be regarded as the drawer of a bill, Stone & Greene as the acceptors, Newell, Daniels & Co. as the payees, and the plaintiff Ellis as indorsee; and the cases of *Smallwood v. Vernon*, (1 *Strange*, 478,) *Ballingall v. Glosster*, (3 *East*, 482,) *Hill v. Lewis*, (1 *Salk.* 132,) *Dean v. Hall*, (17 *Wend.* 221,) and *Oakley v. Boorman*, (21 *Id.* 590,) have been referred to, to prove that position. These cases in fact show that the contract of indorsement, whether on a bill or note, is a new agreement between the indorser and indorsee; that there is a privity of contract between these newly contracting parties, and that therefore the indorsee may maintain an action against his immediate indorser, even where no action would lie against the prior parties to the bill or note. This is familiar doctrine; even the forgery of the maker's name to a promissory note is no defence which the indorser can set up against his indorsee. But I can not see how this principle can help the plaintiff. Suppose that Newell, Daniels & Co. were authorized to treat the defendant as the drawer of a bill of exchange, instead of the indorser of a promissory note, and to write over the defendant's name a bill of exchange directed to Stone & Greene,

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requesting them to pay the amount of the note to Newell, Daniels & Co. or order, and suppose, further, that upon a declaration appropriately framed they could recover upon such bill. Yet they have not written out any such bill; nor have they declared on any such instrument. They have, on the contrary, brought their action in the name of the plaintiff, on the *original note*, made by Stone & Greene, and against the defendant "*as a party to that note.*" And they have no more right to resort to an imaginary bill of exchange, as the foundation of this action, than they would have if the present suit had been upon a bond instead of a note. But I cannot assent to the proposition that such a suit could have been sustained, upon the facts of this case. There is indeed a strong analogy between an indorsed note and a bill of exchange; but I am yet to learn that an indorsee of an ordinary promissory note can declare upon it as an accepted bill of exchange, and recover. There would be some allegations in the count which it would be difficult to prove. The plaintiff would aver, among other things, that the defendant (the indorser) drew his bill of exchange directed to the drawees, (makers of the note,) and thereby requested the said makers to pay to the plaintiff or order a certain sum of money; that afterwards the defendant delivered the said bill to the plaintiff and the plaintiff presented it to the drawees, (makers of the note,) and that they the said makers accepted the same, in writing, &c. Now no case has been cited to show that such a count has ever been held duly proved by such evidence as has been furnished in this case. I believe therefore that the defendant must be liable as an indorser, to Newell, Daniels, & Co., or the plaintiff must be defeated in this suit.

Bearing in mind that this suit is not brought by Newell, Daniels & Co. for money paid to the Tradesman's Bank in taking up the note, but is an action directly on the note, it follows that if Newell, Daniels & Co. can recover against the defendant, on his indorsement, there must be some way of framing a special count to meet the case. There is no better test of a right to recover than this; for pleading is no more nor less than an

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orderly statement of the facts necessary to entitle a party to recover. The pleader would begin by stating the making of the note and the delivery of it to the payees, their indorsement and delivery of it to the defendant, and his indorsement and delivery of it to Ellis the plaintiff. Such is the legal chain of title to the note, and such is the legal intendment of the relative situation and rights of the parties. (*Oakley v. Boorman*, 21 *Wend.* 590. *Herrick v. Carman*, 12 *John.* 160.) Now if the special count should state one fact further which is proved in this case, (viz. that the suit is brought by Ellis for the benefit of Newell, Daniels & Co.) the declaration would be bad on general demurer, upon the authority of *Herrick v. Carman*. But suppose we leave Ellis out of the case, and consider the action as brought by Newell, Daniels & Co. against the defendant, on his indorsement. How then will the declaration be framed? Will it state that Stone & Greene made their note and delivered the same to the defendant, who indorsed it to the payees? Now the very theory of an indorsement is that the indorser is the owner of the note, and transfers by his indorsement the legal title to the instrument, and undertakes to pay it if the maker does not, on due demand and notice. It will be seen, *first*, that unless you take into the account the indorsement of the payees the defendant never could get title to the note, and never could transfer it. A stranger may *guaranty* a note, but no one but the owner in legal intendment, can indorse it. *Secondly*, if you *do* take into the account the indorsement of the payees, then *they* are the prior indorsers, and the defendant the second, and we have the case of the prior indorser suing his own indorsee. The truth is, that no special count can be framed counting upon an indorsement by the defendant to the payees, unless it first states an indorsement by the payees to the defendant; and unless that be *without recourse*, as the chancellor has suggested it may be, there can be no recovery. The payees are the *owners* of the note, by legal construction and intendment; and before the defendant can indorse it to the payees, or to any one else, the title to the note (which can pass only by indorse-

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ment) must be transferred to him by the payees. In this connection, it may be proper to remark, that the doctrine of a class of cases of which *Suydam v. Westfall*, (2 Denio, 205,) is one, has no application to the case at bar, and furnishes no authority for changing the legal relation of the parties. That was an action, not on the note, but for money paid. It is true, that in an action for money paid by an accommodation maker, for an indorser, whose proper debt it was to pay, the plaintiff may show that he made the note for the accommodation of the indorser. But it has not yet been held that the maker can bring an action against the indorser *on the note*, and sustain the suit by proving that he made the note for the indorser's benefit. It is just as impossible for the first indorser to sustain an action against the second, "*as a party to the note*," either directly or indirectly. When a suit is brought *upon the paper itself*, it must be sustained, if at all, upon the contract which the law applicable to commercial paper raises between the parties. Such a suit the plaintiff is endeavoring to sustain here, but the attempt must fail, unless the well settled rules of pleading and the well established principles of commercial law are suspended, for the purpose of enabling him to succeed.

A desire to relieve against the hardship of particular cases has led the courts, at different times, to well nigh construe away the statute of frauds and the statute of limitations. And the same motive has gone far towards breaking up the strict principles of commercial law, and the venerable landmarks of the law of evidence. The consequence has been to beget a degree of confusion and uncertainty in the decisions upon these subjects, which most strongly illustrates the wisdom of adhering to settled principles, and has induced the courts to make a strenuous effort to bring the law back to its original principles. It is not a new thing that parties sometimes are compelled to suffer through the ignorance and negligence either of themselves or those who undertake to secure their rights. If the law be unwise, and productive of injustice or inconvenience, it should be

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amended ; but it should not be perverted, to afford relief to those who have either neglected or violated its provisions.

For the above reasons the motion for a new trial should be denied.

C. GRAY, J., and ALLEN, J., concurred.

PRATT, P. J. This action was brought against the defendant to recover the amount of a promissory note made by the firm of Stone & Greene to the order of Newell, Daniels & Co. for whose benefit this action was brought, and indorsed before delivery to them by the defendant. The note has also been indorsed by Newell, Daniels & Co.; so that upon the face of the paper there is no technical difficulty in the way of the plaintiff's sustaining his action. I shall, in the consideration of the questions raised upon the trial of the cause, assume that Brown indorsed the note for the purpose of giving the makers thereof credit with Newell, Daniels & Co. the payees, and that they parted with their property which was the consideration of the note on the faith and credit of such indorsement ; as there was sufficient evidence to entitle the case, upon this point, to be submitted to the jury.

The first question, therefore, which I shall consider, is whether the indorsement of the defendant, given under the circumstances and for the purposes above assumed, is available to Newell, Daniels & Co. in any form of action. And I must confess that it struck me, upon the argument, as somewhat singular that we should be called upon at this day to consider this question as one of doubt or difficulty. Yet the entire defence is based upon the assumption that the indorsement of the defendant, at the time it was made, was utterly void for all the purposes contemplated by the parties to the note. As my brethren have adopted this view of the case, I have been led to examine with considerable care the decisions of this and the neighboring states, as well as those of England. And whilst I have found the decisions very numerous holding that an indorsement made under such circumstances is a valid and available security in the hands

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of the payees of the note, I have not been able to find any where a single dictum holding a contrary doctrine. It is true that the courts have differed somewhat as to the nature of the contract thereby created, and the form of the count necessary in an action to enforce it; yet I have been unable to find any difference of opinion in regard to the ultimate liability of the indorser. And it is difficult for me to perceive why there should be any difference of opinion. The indorser puts his name upon the note as security for the makers to the payees, to induce them, upon the faith of that security, to part with their property, and upon the faith of such security they do part with it. So long as no positive rule of law is violated, nor any principle of public policy impaired, there is no reason why the contract should not be construed so as to give effect to it according to the intention of the parties. *Ut res magis valeat quam pereat.*

In Massachusetts it is settled by an overwhelming number of cases that where the indorser, in such cases, is privy to the original consideration, and his indorsement contemporaneous with the making of the note, he is liable as a joint and several maker, and this as well when the note is not negotiable as when it is payable to the order of the plaintiff. (3 *Mass. Rep.* 274. 11 *Id.* 436. 9 *Id.* 314. 8 *Pick.* 423, 122. 19 *Id.* 26. 24 *Id.* 64. 4 *Id.* 311, 385. 3 *Metcalf*, 275.) In the case of *Maffs v. Bird*, (11 *Mass. Rep.* 436,) a case in all respects very like the present, Chief Justice Parker, in delivering the opinion of the court, said—"It is manifest that the defendant intended to make himself liable by his indorsement. What then was the effect of his signature? It was to make himself liable to pay the contents of the note."

The same rule has been followed in most of the New England states. (6 *Conn. Rep.* 315. 7 *Id.* 301. 11 *Id.* 440. 9 *Verm. Rep.* 345. 12 *Id.* 219. 16 *Id.* 554. 17 *Id.* 285. [1 *N. Hamp. Rep.* 385.] Many of the other states have adopted the same rule. (2 *McMullin*, 213. 1 *Nott & McCord*, 129. 2 *McCord*, 388. 9 *Ohio Rep.* 39. 13 *Id.* 328.) In others of the states their courts have held the indorsement to amount to a guaranty of payment; thus following the lead of the earlier decisions in

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our own state. (4 *Watts*, 448. 9 *Id.* 353.) In others, again, their courts have held the party liable, either as maker or guarantor according as the intention of the parties appears by the proof; but in no case have they held the contract void. (4 *Watts*, 448. 9 *Ohio Rep.* 39. 2 *McLean*, 553.) In our own state the first case I have found where the question was discussed was that of *Herrick v. Carman*, (12 *John.* 159.) In that case there was no proof that Carman indorsed the note for the purpose of giving the makers credit with the payees, and the court held that prima facie the indorser was not liable to them. Spencer, J. in giving the opinion of the court, puts their decision expressly upon that ground. He observes that "if that fact had appeared, he should have considered him liable to the payees or any subsequent indorsee, and his indorsement might have been converted into a guaranty to pay the note if the maker did not."

The next case was *Nelson v. Dubois*, (13 *John.* 175,) where the question was again discussed and expressly decided. The note was payable to the plaintiff or bearer, and indorsed by the defendant for the purpose of giving the maker credit with him. The court held that he was liable as guarantor of payment of the note; Spencer, J. again giving the opinion, and reviewing the cases at length. *Campbell v. Butler* was the next case, and was directly on all fours with the case at bar. The court held the defendant liable as guarantor. The correctness of the principle adopted in these cases has been expressly recognized in *Tillman v. Wheeler*, (17 *John.* 326;) *Seymour v. Van Slyck*, (8 *Wend.* 421;) *Dean v. Hall*, (17 *Id.* 214;) *Oakley v. Boorman*, (21 *Id.* 588;) *Labron & Ives v. Woram*, (1 *Hill*, 91;) *Seabury v. Hungerford*, (2 *Id.* 80.) The case of *Labron v. Woram* was an action by the plaintiffs as indorsee, against Woram as a first indorser, of a note made by one Nichols payable to the order of the defendant. At the trial it appeared that both plaintiffs and defendant had indorsed the note, but that it had been paid and taken up by the plaintiffs. The defence was that the plaintiffs indorsed the note for the purpose of giving the makers thereof credit with the payee; and it was

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held that they could not recover. Bronson, J. in giving the opinion of the court, says "If the plaintiffs knew of the previous negotiation and put their names upon the note for the purpose of becoming sureties to the defendant for the loan to Nichols, they can not maintain the action. In that case the defendant, if he had not negotiated the note, might have written a guaranty over the plaintiff's name, and in that form have recovered the amount of the note from them;" citing *Nelson v. Dubois*, *Campbell v. Butler*, and *Dean v. Hall*. See also *Story on Promissory Notes*, 473 to 476, and notes; *Maxwell on Bills*, 48; *Chitty on Bills*, 91; *Lovelace on Bills*, 40. There are also some other cases which I shall allude to in another connection. With this mass of adjudications, during so long a time, and during the administration of judges as able as any that ever adorned any bench, before us, the principle would seem to be settled, if it be possible to settle a principle by adjudication, and if there be any form or effect in the maxim of *stare decisis*.

In all these cases the only question upon which there was any conflict of opinion was that in regard to the nature of the contract and the form of the count; and the difference in that respect was more fancied than real, at least so far as regards the courts of this state. For whilst the courts of this state have held that a guaranty of payment was the proper contract to be written over the indorser's name, they have also repeatedly held that such guaranty was in legal effect a promissory note, or in some cases an indorsement waiving demand and notice of non-payment; thus in legal effect conforming to the decisions in the other states. (*Manrow v. Durham*, 3 *Hill*, 584. *Luqueer v. Prosser*, 1 *Id.* 256; *S. C. in error*, 4 *Id.* 420. *Miller v. Gaston*, 2 *Id.* 188. *Hunt v. Brown*, 5 *Id.* 145. *Hough v. Gray*, 19 *Wend.* 202. *Ketchell v. Burns*, 24 *Id.* 456. 26 *Id.* 430. *Curtis v. Brown*, 2 *Barb.* 51.) I assume, therefore, that the principle established by the decisions above cited is now the law of the land, unless those decisions have been overruled by late adjudications.

It will become necessary, then, to examine the recent cases in this state which are claimed to have had the effect to subvert

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principles settled during forty years, and see if any such potency can with fairness be given to them. On a careful examination of those cases I have been not only unable to discover in them any such reckless disregard of previous adjudications, but on the contrary I find in all of them the liability of the indorser is expressly conceded, and the only departure from previous decisions is in relation to the nature of the contract, and whether demand and notice is necessary. It may be a source of regret that our courts should have gone thus far, even. Yet the change does not affect the right, but only goes to the course to be observed in order to make the contract effective.

In *Dean v. Hall*, (17 Wend. 214,) the note was made payable to one Howard or bearer, and indorsed by the defendant in blank. The declaration counted against the defendant as maker of a promissory note, to which there was a demurrer, and the court gave judgment for the defendant. There was no averment of special circumstances to take the case out of the ordinary contract of a commercial indorser. The court held that the note, in legal effect, was precisely the same as if payable to bearer merely, and that there was no difficulty in the way of making the defendant liable in the character of a commercial indorser, and he was therefore entitled to all the privileges appertaining to that character. *Seabury v. Hungerford*, (2 Hill, 80,) was also the case of a note payable to the plaintiff or bearer, and indorsed in blank by the defendant. The plaintiff claimed to recover on proof of the note and indorsement. The judge, at the circuit, ruled that the plaintiff could not recover against the defendant as maker or guarantor, for want of proof that he was privy to the consideration; that he could not recover against him as indorser for want of demand and notice, and ordered a verdict for the defendants. The court in bank followed their decision in *Dean v. Hall*. Bronson, J. says, "that the defendant might be charged as indorser, and when he can be so charged he can not be made liable in any other manner."

In *Hall v. Newcomb*, (3 Hill, 233,) the note was made payable to the plaintiff or order, and indorsed in blank, by the de-

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fendant, for the accommodation of the maker. No demand or notice was proved. The court held that the defendant was not liable. Cowen, J. said "that the plaintiff might have put the note in such a form, by indorsing it himself, as to charge the defendant below in the character of second indorser. The note being entirely available to the holder in that form, the giving it effect in any other would therefore be going beyond the principle which makes a contract enure as having a different effect from what its direct words import. Such a forced construction should never be made, except to prevent a failure of the contract altogether. *Ut res magis valeat quam pereat.*" The decision in this case was affirmed in the court for the correction of errors by a majority vote. The chancellor, in giving the prevailing opinion, puts his decision expressly upon the ground that the indorsement of the defendant was an available security in the hands of the payee, and that he might be charged as indorser. He says, "Here there was no difficulty in charging Newcomb as indorser of the note, in favor of Hall, from whom it appears the maker intended to get the \$250 to enable him to take up the former note."

The next and last case is that of *Gilmore v. Spies*, similar in its circumstances to that of *Hall v. Newcomb*. The present supreme court, sitting in the first district, Justice Cady presiding, followed the decision in that case. The court of appeals, into which the action was subsequently brought, affirmed the decision of the supreme court, Judge Gardiner dissenting. Judges Jewett, Bronson and Gardiner, all of whom wrote opinions, assumed that the indorsement was available to the payees, and they only differed on the question whether a demand and notice was necessary to charge the indorsee; Gardiner, J. insisting that no demand or notice was necessary. It will be seen, therefore, that these decisions in no wise countenance the doctrine contended for by the defendant's counsel; but on the contrary expressly recognize the validity of the contract, and only depart from the earlier decisions in this state in holding that the indorser, under such circumstances, is entitled to all the privileges of an ordinary commercial indorser, as to demand and notice.

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The next question, therefore, which is presented in this case is that in relation to the nature of the contract entered into by a party who indorses a note under the circumstances proved in this case, and whether the pleadings are such as to give the plaintiff the benefit of the same. In the first place, is there any difficulty in the nature of the case in treating the defendant as an indorser, at least so far as to require of the holder demand and notice? I confess I have not been able to discover any. 1st. It has frequently been held that the indorsement of either a bill or promissory note was itself a bill of exchange. (*Story on Prom. Notes*, § 128 and notes. 3 *East*, 482. 1 *Salk*. 125, 132. 17 *Wend*. 221. 25 *Id.* 591. *Chitty on Bills*, 218, 219. 2 *Burr.* 669. 2 *B. & P.* 80. *Willes*, 394, 397. 5 *Term. R.* 485. 4 *Mass. R.* 258. *Skinner*, 410. 9 *Watts*, 352. 4 *Term. R.* 148. 2 *Spear*, 672.) The contract written out is simply a request to the maker to pay the holder, or any particular payee, the amount of the bill or note. This of itself is, to all intents and purposes, a complete bill.

I can see no difficulty, in the nature of the case, in a party requesting the maker to pay the amount of the note to the payee named therein; and when the note is indorsed by one not a party to it, before delivery to the payee, it seems to me that is *prima facie* the contract entered into by the indorser. And proof that such was the intention of the parties would leave, in my opinion, no doubt. The ordinary commercial indorsement operates as an assignment or transfer of the note, as well as a bill of exchange; but when the note is not negotiable, or is indorsed by one not a party to it, it operates as a bill of exchange only. It was held in 1 *Salk*. 132, where the payee indorsed a note not negotiable, to a third person, that such indorsement amounted to a bill of exchange, drawn on the maker in favor of such person, and that the indorser was entitled to all the privileges of an ordinary commercial indorser. The legal title to the note did not pass by the indorsement, yet the relation between the indorser and indorsee was the same as if it had passed. I can perceive no greater difficulty in holding the defendant in this case liable. He was neither payee nor indorsee

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of the note, and could not, therefore, make the ordinary contract of a commercial indorsement. (7 *Conn. R.* 306. 4 *Id.* 389. 6 *Id.* 315. 1 *N. Hamp. Rep.* 385. 24 *Pick.* 64. 9 *Watts*, 353.) Yet, so far as respects making himself liable, there is no difficulty.

The language of the indorsement, addressed to the maker, is "Pay the within to Newell, Daniels & Co. or order," and it thus becomes a bill drawn by the defendant upon the maker in their favor. The promise of the maker to pay, contained in the note, is equivalent to the acceptance of the bill. The acceptor in every case, in legal parlance, says, "I promise to pay the bill to the payees," in this case to Newell, Daniels & Co. The whole instrument, with the indorsement, therefore, becomes simply an accepted bill of exchange. (1 *Miss. Rep.* 194.)

2d. It follows that if the instrument is a bill of exchange, payable to Newell, Daniels & Co. or order, and has been by them indorsed, that the holder can count upon it as such, or give it in evidence under the money counts. It is always competent to declare according to the legal effect of an instrument. (*Skinner*, 410. 1 *Salk.* 125. 1 *Ld. Raym.* 181, 143. 9 *Watts*, 352. 4 *Term R.* 148. 6 *Mod.* 29, 30.)

3d. By treating the instrument as an indorsement or bill payable to Newell, Daniels & Co., the defendant is entitled to the usual privileges of an indorser, and it also avoids the necessity of resorting to the circuitous course suggested in some of the late cases. (*Hall v. Newcomb*, 7 *Hill*, 486. *S. C.* 3 *Hill*, 233.) The chancellor, in his opinion in that case, suggests that in order to reap the fruits of the contract the payee must indorse over the note without recourse, and then sue as holder; in other words, in legal effect he must sell the note and buy it back again in order to make the indorsement available. As was observed by a learned senator, this method of enforcing a contract is not very consistent with the straight forward principles of the common law. It is quite obvious that the parties themselves never contemplated a resort to any such complicated machinery, in order to give the contract force and effect. Their

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intention was, doubtless, that the defendant should be liable directly to Newell, Daniels & Co.

But it is insisted on the part of the defendant, in the first place, that to hold him liable to the payees of the note would be changing the legal effect of the contract. I answer, (1st.) The same might be said in relation to all proof of the consideration or purpose of promissory notes; yet it is every day's experience at the circuit, that proof is admitted to show the note was made for the accommodation of the indorser, or some party subsequent to the maker, and thus change the relative liability of the parties as indicated by the note itself; and no one doubts the right so to do. (1 *Moody & Malk.* 226. 7 *Taunt.* 163. 4 *Watts*, 448. 1 *Hill*, 91.) It is one of the peculiar conveniences of this species of contracts, that they are not subject to all the strict rules that pertain to other written contracts. (10 *Wend.* 516. 5 *Hill*, 232.) (2.) When the note was delivered to the payees, their names were not on it as indorsers. If the contract was complete at that time between the parties, it will scarcely be insisted that they lost their rights by subsequently transferring the note. But how can we ascertain that the contract was not complete? There is no stipulation or reservation found in the contract that the payees must first indorse the note before the defendant should be deemed liable. It is simply a speculation, or at most a presumption growing out of our knowledge of the usual manner of doing business of that kind; and it would be strange indeed if such presumption could not be rebutted by evidence. Besides, there is a fallacy in treating the mere indorsement or signature as a complete contract. It simply implies an authority in the holder to write over the name such a contract as the usages of trade, or the circumstances of the case, will warrant. An indorsement by one not a party to the note in the hands of the payee, if it implies any contract whatever, is at least ambiguous, and parol evidence is competent to show the intention of the parties. (7 *Conn. Rep.* 301. 4 *Id.* 389. 6 *Id.* 315.) It is always competent to show the circumstances under which a contract is made, to aid the

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court in construing it, and especially so in cases of bills and notes. (*Suydam v. Westfall*, 2 Denio, 205.)

In the second place, it is insisted that the indorsement is void within the statute of frauds. I am unable to discover any greater difficulty in this case, with the statute, than in any case where a bill or note is given as collateral security for the debt of another. It has so frequently been held that blank indorsements or signatures, even given under such circumstances, are not within the statute, that it will only be necessary to refer to them. The case of *Violett v. Patten*, (5 Cranch, 142,) was a blank indorsement of a blank note given as collateral security for the accommodation of the maker, and which was filled up by the holder. The court held (Ch. J. Marshall giving the opinion) that the indorsement was a letter of credit for an indefinite sum, and that the statute of frauds was no objection to a recovery. (See also *Douglass*, 514; *Oakley v. Boorman*, 21 Wend. 588; 1 *Strange*, 478. 3 *East*, 482.) The signature of the party implies an authority to fill up the blank; and if when that is filled, it makes a valid contract it is sufficient.

4th. Although we have shown, as we think, by an examination into the nature of the contract, that there is no difficulty in the way of a recovery against the defendant in this case as a drawer of a bill, yet we are not without direct authority upon the point. The case of *Milton v. De Yampert*, (3 Ala. Rep. 648,) is directly in point. The action was upon two promissory notes, made by one Jenkins, payable to the order of the plaintiff and indorsed by the defendant in blank. The declaration counted against the defendant as maker, and also as guarantor, and contained the money counts. It was proved upon the trial that the defendant indorsed the note as security for Jenkins the maker. Due demand and notice was also proved. It was held that the plaintiff was entitled to recover upon the money counts. Goldthwait, J. in giving the opinion of the court, says, "the contract of the defendant in this cause, though not an ordinary indorsement, in the technical sense of that word, is to be governed by similar rules, and his liability was complete as soon as the maker made default, and the notice was given of the re-

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fusal or neglect to pay. (See also *Jordan v. Garnett*, 3 Ala. Rep. 610.)

The case of *Pinney v. Innes*, in the English court of exchequer, (1 C. M. & R. 439, reported also in 5 Tyr. 107,) was an action upon a bill of exchange drawn by one W. Nelson, payable to the order of himself and indorsed by him, specially to the plaintiffs or order. It was indorsed by the defendant in blank, and after that by the plaintiffs, presenting a case in principle very like the case at bar. It was held that the indorsement by the defendant was equivalent to a fresh drawing in favor of the plaintiffs, and that they were entitled to recover. By Lord Lyndhurst, C. B. "The indorsement of this bill by the defendant, gave it all the effect of a new instrument, as against him." By Parke, B. "Every indorser of a bill is a new drawer. It is urged that the defendant, when he indorsed the bill, had no property in it, but that is not necessary in order to render him liable to be sued upon it. The indorsement was equivalent to drawing a new bill, and was intended to transfer that new bill to the plaintiffs. It has been argued that the case may be treated as if the defendant was indorsee of the plaintiffs, and as if he had again delivered the bill to them, and it is said in such a case, to avoid circuity of action, the plaintiffs ought not to be permitted to recover. But the fact was not so. The defendant never was the indorsee of the plaintiffs, nor was it ever intended to convey the property in the bill to him. Then he had no power to transfer that title. It depends on the intention with which a name is put upon a bill, whether the order of indorsement signifies or not." Alderson, B. "The indorsement by the defendant operated as against himself as a good and valid indorsement, though he himself had no title. Such indorsement would give a title against himself as fresh drawer, without any operation as to the other parties to the bill." I cite from the opinions at some length, because they present and triumphantly answer the same objections urged by the defendants in this case. The same general doctrine was held in Connecticut, if I understand their decisions, until their courts were led off by the decisions of the courts in Massachusetts. Chief J. Hosmer, in his

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dissenting opinion in *Beckwith v. Angell*, (6 Conn. Rep. 322,) insisted, and as I think with unanswerable arguments, upon adhering to their own decisions, but was overruled. He put the indorsement of a note not negotiable and the indorsement of a negotiable note by one not a party to it, upon the same footing, and insisted that although it would not be technically a commercial indorsement yet it was in effect the same, so far as the rights and liabilities of the indorser were concerned. (*See 2 Root*, 325; 4 Conn. Rep. 124, 527.)

The same doctrine is alluded to, and expressly approved, in the cases of *Oakley v. Boorman*, (21 Wend. 588,) and *Dean v. Hall*, (17 Id. 214.) In the latter case Cowen, J. said, "An indorsement, when the interest in the note passes, and indeed whether it does or not, as between the original parties, is in the nature of a bill of exchange drawn by the indorser upon the maker, payable to the holder. (*See also 10 Wend.* 516; 5 Hill, 232; 9 Watts, 353; *Max. on Bills*, 48; *Chit. on Bills*, 91; *Lov. on Bills*, 40; *Bay. on Bills*, 107.) When the indorser put his name upon this note, in whose favor did he indorse it? Or, in other words, in whose favor did he draw the bill? To whom did he request the makers to pay the amount of the note? Under the circumstances proved in this case there can be but one answer. He requested them to pay it to Newell, Daniels & Co. It follows then that the plaintiff is entitled to recover as upon an indorsement or bill of exchange drawn on the maker in favor of the payees, or their order.

But if the indorser should be held liable as maker or guarantor of the note, following the numerous decisions to that effect, there is still no difficulty in his recovering in this action. If he is a several maker of the note, the same being negotiable, the plaintiff is entitled to sue. If it be held a guaranty of payment, the guaranty being written upon the back of the instrument, it assumes, as to negotiability, the character of the paper upon which it is written, and becomes itself negotiable. (19 Wend. 557, 202. *S. C. in error*, 26 Id. 425. 24 Id. 456. 20 John. 365. 1 Hill, 256. 4 Id. 420. *S. C. in error*, 5 Id. 146.

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6 *Id.* 641.) And being itself a promissory note may be given in evidence under the money counts. (*See cases cited above.*)

Even if, in consequence of a technical difficulty, it should be held that Newell, Daniels & Co. could not have recovered directly upon the note, yet if, as in *Suydam v. Westfall*, they would have an action for money paid, I can see no difficulty in the plaintiff in this case sustaining his action. There was nothing in the nature of the case to prevent the payees of the note from paying the money into the bank and having the bank sue the note for their benefit. Suppose A. makes a note payable to the order of B., for B.'s accommodation, and which he indorses and gets discounted at a bank. If when the note becomes due B. does not pay it, what is to prevent A. from paying the money into the bank and procuring the bank to prosecute B. upon his indorsement, for A.'s benefit? But if a suit can be sustained by the bank, why not by an individual to whom the note is transferred, provided it is done for the benefit of the individual who is entitled to the money when collected.

The defence to the note in this case is not based upon the fact that there may be some technical difficulty in the way of a recovery by Newell, Daniels & Co. directly upon the note; but it is based upon the broad principles of equity that as between them and the defendant the note was theirs to pay, and having been taken up by them it became ipso facto satisfied. If the party who takes up a note is not primarily liable, as between himself and other parties, to pay the same, I know of no adjudication or legal principle which would preclude him from again putting the note in circulation for the purpose of enforcing it against those parties who, as to him, are primarily liable. (4 *Bing.* 390. 3 *C. & P.* 134.) In any aspect of the case, therefore, I feel clear that the plaintiff was entitled to recover.

In relation to the application of the proceeds of the leather consigned to Newell, Daniels & Co., I think those proceeds should be applied upon the note, unless they advanced money or property without notice of the defendant's claim. It seems the leather in fact belonged to the defendant, and he was therefore entitled to the proceeds. If Newell, Daniels & Co. have

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sold it and received the avails, they would hold the same as so much money received to the defendant's use, and he is entitled to have it applied either as payment or as a set-off. It does not appear whether the proceeds amounted to enough to pay the note or not. A new trial should therefore be granted.

New trial denied.

SAME TERM. *Before the same Justices.*

ROTH vs. SCHLOSS.

The denial of a motion to amend, where the law reposes a discretion in the judge, is not an appropriate ground of exception.

To sustain an exception for a refusal of the judge, at the trial, to allow an amendment of the complaint, the party must show a clear case of unquestionable right.

Money paid in satisfaction of a valid judgment, which stands unreversed, can not be recovered back, on the ground that the execution issued upon the judgment, by virtue of which the defendant's goods were seized, was irregularly issued; both parties at the time supposing it to be regular.

After a judgment has been recovered in a court of common pleas, and an execution issued to another county and levied upon the defendant's property there, without the filing of a transcript or the docketing of the judgment in that county, the court in which the judgment was recovered has power to order a transcript to be filed, and the judgment to be docketed, in the county where the defendant's property was seized, *nunc pro tunc*.

Such a defect in an execution is amendable, and the execution will stand good, and afford a justification to the sheriff, until it is set aside by a court of competent jurisdiction.

MOTION for a new trial. The plaintiff brought an action under the code of procedure, as the assignee of a certain demand against the defendant, which arose under the following circumstances. The defendant, several years since, recovered a judgment in the Albany common pleas against Adam Warner and Francis Schneider. On or about the 13th day of May, 1848, a

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feri facias was issued on the said judgment to the sheriff of Madison county, who levied on property of Warner and Schneider; and those persons thereupon paid to the sheriff the debt and sheriff's fees, amounting in all to \$400. No transcript of this judgment had been filed, nor had the judgment been docketed in the county of Madison. The plaintiff supposing that this omission entitled the defendants in that judgment to recover back the money they had paid, procured an assignment of the claim to be made to himself, and then brought this action.

The plaintiff's counsel opened the cause to the court and jury upon the trial, by stating the facts as they appeared in the pleadings, and was about to proceed with his evidence, when the defendant's counsel moved for a nonsuit, upon the ground that, by his own showing, the plaintiff's assignors had only paid a valid and legal judgment, and therefore the money could not be recovered back. The plaintiff's counsel then offered to prove, in addition to the facts before stated, that the money was paid "in mistake and misconception of the facts, supposing the execution to be a legal and valid process." This offer was objected to, among other grounds, for the reason that there was no such allegation in the complaint; whereupon the plaintiff's counsel proposed to give the evidence, and to amend under the 145th and 146th sections of the code of 1848. This motion and offer were overruled. The counsel then moved to amend under the 149th section, which motion was also denied, and those rulings of the court form the ground of the first exception. The plaintiff, upon a case, moved for a new trial.

W. Hunter, for the plaintiff.

C. P. Kirkland, for the defendant.

By the Court, GRIDLEY, J. I. The question of amendment did not arise under the 145th and 146th sections of the code. There was no *variance* in the case. There was an omission in the complaint of the entire allegation offered to be proved. It was therefore a case under the 149th section, and the motion

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should not have been granted unless it had clearly appeared that to grant it would be "*in furtherance of justice.*" If it be admitted that the fact offered to be proved was material for the plaintiff to establish, then that fact might be controverted by the defendant, which would require an amendment of the answer, and very likely, upon that new issue it would be material to produce witnesses who were not then in attendance at the court. At all events the defendant should have an opportunity to answer the application to amend. This opportunity he could not have at the circuit, for he was not there. The application therefore was properly denied. But we do not think that the denial of a motion to amend, where the law reposes a *discretion in the judge*, is an appropriate ground of exception. To sustain an exception for a refusal of the judge at the trial to allow an amendment of the complaint, the party must show a clear case of unquestionable right; and that can seldom occur except when the question arises under the 145th section. The decision in such a case is nothing more nor less than a decision upon a special motion informally made upon the trial.

II. The next question is whether the plaintiff was entitled to recover, at all; or, in any event, more than the sheriff's fees. If the execution was absolutely void, then it was conceded on the trial that he would be entitled to recover the sheriff's fees; and the ruling at the circuit was upon the assumption, most favorable to the plaintiff, that the execution was void. We are of the opinion that assuming that the execution was void, the decision at the circuit was right. (1.) In order to arrive at a correct conclusion upon this point, it is necessary to inquire what facts appear from the pleadings. One of the general rules of pleading established by the code of procedure provides that any material allegation in the complaint not specifically controverted in the answer, and any material allegation in the answer not specifically controverted in the reply, shall be taken as true. (*Laws of 1848, p. 525, § 144.*) Applying this rule to the pleadings in this cause, it will be found that the following allegations of fact are admitted—1st. That the transcript of the judgment in the Albany common pleas was, before the issuing of the ex-

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ecution, duly mailed to the clerk of Madison county to be filed, &c. 2d. That the officer who made the order setting aside the execution had no jurisdiction to entertain the motion, or to make the order. 3d. That the money was paid by the defendants in the judgment in *satisfaction of the said judgment*. These averments are found in the answer, and are not controverted in the reply, and are therefore admitted. (2.) Another question discussed upon the argument was, whether the action should be considered as sounding in tort, or be regarded in the nature of an action for money paid, or had and received. The forms of actions are abolished; and so far as the rights of parties depend upon the form of the action, there may sometimes be a difficulty not foreseen nor provided for by the legislature. In this case, however, we think the action clearly sounds in contract. If, under the old system, the action had been trespass, for the unlawful seizure of the goods on the execution, the plaintiff would have recovered the full value of the goods, however inequitable that might have been. But even then, if the goods had been restored to and received by the party, as they were in this case, then the recovery would only be for the actual damages occasioned by the seizure. The plaintiff has not so framed his complaint as to make the unlawful seizure the gist of the action. Nor has he alledged any fact that characterizes an action of tort. He has sued to recover the money paid. He sought to prove that he paid it by mistake. He made a demand of the money before the suit was commenced. And he demands at the close of his complaint the sum that was paid, with interest from the day of payment. It is quite clear, therefore, that we must regard this action as brought upon the equitable facts of the case, and as a substitute for the old action for money paid, and money had and received to the use of the plaintiff.

The question then arises, whether money *paid in satisfaction of a valid judgment*, which stands unreversed, can be recovered back, because the execution by which the goods were seized was irregularly issued, both parties at the time supposing it to be regular. We think it cannot. Blackstone says, (3 Bl.

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Com. 163,) "this action is a very extensive and beneficial remedy, applicable to almost every case where a person has received money which *ex æquo et bono* he ought to refund." Again, it must be a case in which "the money received by the defendant ought, *ex æquo et bono*, to be deemed as belonging to him." (*Doug.* 138.) Again, "the defendant may go into every equitable defense which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole or any part of the demand." (2 *Burr.* 1010.) No case has been cited which furnishes a precedent for this action, in a case where the judgment on which the money was received was valid and remained unreversed. In fine, the admission in the pleadings that the money was paid "*in satisfaction of the judgment*," puts the question at rest.

III. The plaintiff was rightly nonsuited, for another reason. A statute, which was overlooked by the counsel, both on the trial and on the argument of the cause, removes the last vestige of the plaintiff's ground of action. By the 7th section of the act in question, (*Laws of 1844, p. 92, § 7*,) power is given to the supreme court, and also to the courts of common pleas, to direct the amending and correcting of the dockets of judgments in other counties, and to direct the docketing of judgments *nunc pro tunc* with the clerks of other counties; and it is provided also that they shall possess the same powers over the dockets of their judgments in other counties 'as when docketed with their own clerks. By virtue of this provision, therefore, the county court has, or the county court of the county of Albany had, full power to order the transcript to be filed and the judgment docketed in the county of Madison *nunc pro tunc*. The defect was *amendable*, and therefore the execution stands good until it be set aside by a court of competent jurisdiction. And whenever a motion to set the same aside shall be made, the amendment will doubtless be allowed and the motion denied. The regularity of the execution can not be questioned in this suit, or in any other collateral proceeding. The execution was a full justification to the sheriff for the seizure of the goods, and would have been so held in an action of trespass brought directly against him. (*See 3 Caines,*

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267 ; 11 *Wend.* 31, 32 ; 4 *Cowen*, 550 ; 4 *Denio*, 243 ; 3 *Cowen*, 39, 42.) The action is therefore left without the shadow of a foundation to rest upon.

Motion for new trial denied.

WASHINGTON GENERAL TERM, May, 1848. *Cady, Willard,*
and Hand, Justices.

THE TRUSTEES OF THE FIRST BAPTIST CHURCH IN THE
CITY OF SCHENECTADY *vs.* THE UTICA AND SCHENEC-
TADY RAILROAD COMPANY.(a)

In an action by the trustees of a religious society, against a railroad company, the declaration alleged that the religious society had been disturbed, during divine worship on the sabbath, in the church edifice, by the noise made by the defendants in the use of their road, by which the property had become very much depreciated in value and rendered unfit for use as a church or house of religious worship, and claimed damages therefor ; *Held*, on demurrer, that although the injuries complained of might amount to a public nuisance, yet that no action could be sustained by the plaintiffs, as owners of the building, for the depreciation in the value thereof ; the consequences being too remote.

Held also, that if the plaintiffs could not recover on account of the depreciation of their property they could not recover at all ; the congregation or society worshipping in the church, and not the plaintiffs, being the persons molested.

The custody and management of the real estate of a religious corporation belongs to the trustees, as such ; but they can not sue for disturbing the society, while worshipping in the church edifice, by making a noise. There must be some injury to the property, immediate or consequential.

Although noise may amount to a nuisance, and is also actionable, yet it must be a very special case in which real estate can be injured by a mere noise, so as to sustain an action for the injury. *Per HAND, J.*

That which is authorized by an act of the legislature can not be a nuisance. *Per HAND, J.*

Where the exceptions in a statute are contained in the enacting clause, and not in a proviso, the declaration in an action for a violation of the statute, must negative the exceptions.

(a) PAIGE, J. having been counsel, did not hear this case.

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DEMURRER to declaration. This was an action on the case. The declaration stated that the defendants were the owners or possessors of a certain railroad running near and contiguous to the lot of land belonging to the plaintiffs, as hereinafter mentioned, upon which railroad the defendants were accustomed to run their cars and locomotive engines; and that the said plaintiffs were the owners of a certain piece or parcel of land situate and being in the city of Schenectady, and were lawfully possessed thereof before the construction of said railroad, upon which land a building was erected, and is still standing, of great value, to wit, of the value of \$7000, which building was erected for the purpose of being used as a meeting house or place of religious worship, for and by a certain religious society or congregation known by the name of The First Baptist Church in the city of Schenectady; and which building was before and at the time, and since, the committing of the grievances hereinafter mentioned, and still is, used as a place of public worship, by the religious society or congregation aforesaid. Yet the said defendants well knowing the premises, but contriving and wrongfully, improperly and unjustly intending to injure the said plaintiffs and to depreciate the value of their said property for the purpose aforesaid, and to deprive them of the use, benefit and enjoyment thereof, and to annoy, molest and incommode them in the quiet and peaceable use, possession and enjoyment of their said property as a place of religious worship, heretofore, to wit, on the 5th day of April, in the year 1843, and on divers other days between that time and the time of the commencement of this suit, wrongfully, improperly and injuriously, by themselves and their agents, on the sabbath, when the said religious society or congregation were lawfully assembled in said meeting house, and lawfully engaged in public and religious worship, rang their stationary bell contiguous to said house of worship, or caused the same to be rung, and by ringing or causing to be rung their bells attached to their locomotive engines, and by the puffing and whistling of said locomotive engines, and blowing off of steam therefrom, and thereby, while standing near to said house of religious worship; and by the rumbling, jarring noise of said

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railroad cars and steam engines, when moved and propelled by steam on said railroad, and by the unlawful and improper use of their said railroad, on the sabbaths, disturbed, annoyed and molested the said society or congregation while engaged in worshipping as aforesaid, in the quiet and peaceable use and enjoyment of their property. By means whereof, and in consequence of which, the value of said meeting house and place of worship, for the use and purpose aforesaid, hath been, and still is, greatly depreciated and rendered entirely unfit for, and valueless as, a house of religious worship, &c. To this declaration the defendants demurred specially. Joinder.

P. Potter, in support of the demurrer.

N. Hill, Jr. & D. Wright for the plaintiffs.

By the Court, HAND, J. The fair construction to be given to the declaration in this case is, that the church or society, occupying the church edifice owned by the plaintiffs, had been disturbed during divine worship on the sabbath, by the noise made by the defendants in the use of their road, by which the property has very much depreciated in value for use as a church. It would be a forced construction to consider it a charge of doing this unnecessarily, wantonly and maliciously, and for the sole purpose of disturbing the congregation. These acts I understand to be alledged to be unlawful, not from any such motive or cause, but because the road was used on the sabbath. Considering this as the gravamen of the case, I think the demurrer well taken.

The mere consequential advantages or disadvantages of a railroad to a neighborhood, can not be the subject of private action. Its termination, for instance, may incidentally influence the value of real estate; greatly enhancing the property of some persons in the vicinity; but the corporation can claim no compensation for this improvement; while others may suffer a corresponding depreciation and be remediless. These are fluctuations to which real property is subject; and on the one hand

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there is an accidental advantage for which the fortunate owner makes no return, and on the other it is *damnum absque injuria*. In *Hughes v. Heizer* it was held that one whose raft was stopped by an obstruction in a navigable river could maintain an action. (1 *Bin.* 463.) But Sutherland, J. in *Lansing v. Smith*, (8 *Cowen*, 167,) after stating this case, remarks, "Suppose the consequential injury complained of had been the depreciation of the value of his lot, or his timber, whereby he was prevented from selling either the one or the other for as large a price as he could have obtained before the navigation of the river was impeded by the dam. He would, I apprehend, have been told that there was nothing peculiar in his case; that if his land and timber were rendered less valuable by the obstruction placed in the highway leading to a market, so were the land and timber of his neighbors and of all others above the dam; that the erection of the dam was a public offence, and the defendant could be punished criminally for building it, and the dam itself be demolished by a public prosecution; and that public policy forbade that a multitude of suits should be brought for an act which essentially concerned the public; although in its remote effects it might bear peculiarly upon a particular district." And the case of *Lansing v. Smith* was decided upon this principle, and affirmed in the court for the correction of errors. (4 *Wend.* 9.) The mutations in business, and the consequent change in the value of property, constantly occurring from the improvements of the day, are as a general thing not foundation for a legal claim. Few railroad companies could sustain themselves under such a rule of accountability. Therefore, although the abuses alledged may amount to a public nuisance, we are inclined to the opinion that as to the plaintiffs, as owners of the building, the consequences are too remote.

And if the plaintiffs can not recover on account of the depreciation of their property, they cannot recover at all. The congregation and society worshipping there, and not the plaintiffs, are the persons molested. The custody and management of the real estate of a religious corporation belongs to the plaintiffs as trustees, but they cannot sue for disturbing the society while worshipping

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in the church edifice, by noise. There must be some injury to the property, immediate or consequential. No case has been cited, and I think none can be found, where a suit has been maintained for injury done to real estate by mere noise, although many nuisances removable in their nature may be an injury, even to the reversion. (*Tuckerman v. Newman*, 11 A. & E. 40.) The occupants who suffer special damage may, in some cases, have a right of action. The rule is that one who sustains special and particular damage by an act which is unlawful, on the ground of public injury, may maintain an action for his special injury. It should be actual or particular damage distinct from other citizens, and not in common with those of a class. (*Myers v. Malcom*, 6 Hill, 292. *Mills v. Hall*, 9 Wend. 315. *Duncan v. Thwaites*, 3 B. & C. 556. *Brill v. Flagler*, 23 Wend. 354. *Elliotson v. Feetham*, 2 Bing. N. C. 134. *Lansing v. Smith*, 8 Cowen, 153. *Spencer v. Lond. & Bir. Railway*, 8 Sim. 183. *Price v. Dart*, 7 Cowen, 609. *Smith's Lead. Cas.* 131. *Rosse v. Groves*, 5 M. & Gr. 613.) In *Elliotson v. Feetham* the declaration stated that the dwelling house of the plaintiff was greatly lessened in value by the noise and fires in the work-shops of the defendants; but that was on demurrer, and there were other allegations sufficient to maintain the action. I think it must be a very special case in which real estate can be injured by a mere noise. And besides, the noise in this case is, from its very nature, temporary and occasional.

But I do not think a private action can be maintained by an attendant upon divine worship there, even admitting this were a public nuisance. He does not receive special or particular damage. If one can, every one may maintain a suit. In *Owen v. Hinman*, the plaintiff sued for disturbing him in the enjoyment and exercise of public worship, by making loud noises, reading, talking, &c. and was defeated, on the ground that no right of person or property in the plaintiff had been invaded. No damage had been done to his person, property or reputation; and if a suit could be sustained in such cases for noise, the field of litigation would be extended beyond endurance. The statute has also provided for this offence. (1 R. S. 674, § 64.)

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Perhaps it is therefore not necessary to decide the question raised in this case, whether the facts stated in this declaration amount to a common nuisance. But if it were, I should doubt that position very much. Unquestionably noise may amount to a nuisance, and is also actionable. (*Brill v. Flagler*, 23 *Wend.* 354. *Elliotson v. Feetham*, 2 *Bing. N. C.* 134. *Street v. Tugnell*, cited 2 *Sel. N. P.* 299. *Carrington v. Taylor*, 11 *East*, 571. *Keeble v. Hickeringill*, *id. ib. n.* *Rex v. Smith, Stra.* 704.) But that which is authorized by an act of the legislature cannot be a nuisance. The reason that a private action will not lie for a common nuisance, unless there be special or particular damage, is not only because of multiplicity of suits, but the king is intrusted with the remedy. (*Iveson v. Moore, Com.* 59.) A party having this license from government may be liable *civiliter* for a misuse of his privileges, on the principle *sic utere tuo ut alienum non lædas*, but not *criminaliter*; nor can the erection be abated as a nuisance. (*Sutherland, J. in Crittenden v. Wilson*, 5 *Cowen*, 167. *The People v. Platt*, 17 *John.* 195.) Where a railroad corporation had authority by statute to make a railway on a given line, not deviating therefrom over 100 yards, and within that limit made their track about one rod from an ancient highway, and the horses of travelers were in consequence frightened by their trains, it was held that this interference with the rights of the public must be taken to have been sanctioned and contemplated by the legislature; and that an indictment for a nuisance would not lie. (*Rex v. Pease*, 4 *B. & Ad.* 30.) And there are several authorities bearing upon the same point. (*Lex. & O. R. R. v. Applegate*, 8 *Dana*, 289. 2 *Kent*, 340. *Bloodgood v. M. & H. R. R. Co.* 18 *Wend.* 1. *Fletcher v. A. & S. R. R. Co.* 25 *Id.* 462. *Hamilton v. The New-York & Harlem R. R. Co.* 9 *Paige*, 171. *Hudson & Del. C. Co. v. New-York & Erie R. R. Co.* *Id.* 323. *Wilson v. The Black Bird Creek Marsh Co.* 2 *Peters*, 245. *The People v. Sar. & Rens. R. R. Co.* 15 *Wend.* 113. *The Mohawk Bridge Co. v. The Utica & S. R. R. Co.* 6 *Paige*, 554. *Williams v. Wilcox*, 6 *A. & E.* 314. *Rex v. Morris*, 1 *B. & Ad.* 441.)

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It is also alledged that the acts complained of were done on the sabbath. That would be unlawful, by the statutes of this state, unless within one of the exceptions. But as the exceptions are in the enacting clause of the statute, and not in a proviso, the declaration must negative the exceptions. (*Spiers v. Parker*, 1 T. R. 141. *Street v. Smith*, 1 B. & Ad. 94. 1 Ch. Pl. 206. *Dwar. on Stat.* 661. *Teel v. Fonda*, 4 John. 304.) The acts of the defendants were lawful on that day, unless prohibited by statute. (*Story v. Elliott*, 8 Cowen, 27. *Boynston v. Paige*, 13 Wend. 425. *Sayles v. Smith*, 12 Id. 67.) The statute is, "Nor shall any one travel on that day, unless in cases of charity or necessity, or in going to and returning from some church or place of worship within the distance of twenty miles, or in going for medical aid or for medicines, and returning, or in visiting the sick and returning, or in carrying the mail of the U. States, or in going express by order of some public officer," &c. "Nor shall there be any servile laboring or working on that day unless" done by persons who keep Saturday as a holy time, &c. (1 R. S. 675, § 70. *Watts v. Van Ness*, 1 Hill, 76.) The same language is used here to introduce the exceptions, as in *Spiers v. Parker*, (*supra*.) It does not appear, therefore, by this declaration, that the defendants were unlawfully traveling on that day. Consequently it does not become necessary to inquire whether, had these acts been illegal because done upon the sabbath, they would have constituted a nuisance, any more, for that reason.

There must be judgment[•] for the defendants, with leave to amend on the usual terms.(a)

(a) See *The First Baptist Church in the City of Schenectady v. The Schenectady and Troy Railroad Company*, (5 Barb. Sup. Court Rep. 79,) where a contrary decision was made by the justices of the third district. It will be seen that the present case was first decided; but it does not appear whether it was brought to the notice of the court in the case above referred to. Owing to the novelty and interest of the principles discussed, it has been deemed advisable to report both of these cases. The growing importance of decisions of this nature, under the rapid extension of our railway system, and the immense variety of public improvements constantly going on, seems to render this course expedient and proper, in the present instance.

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ALBANY GENERAL TERM, September, 1848. *Harris, Watson, and Parker*, Justices.

VAN EPPS vs. VAN EPPS.

What is sufficient evidence of adultery, in a suit for a divorce.

IN EQUITY. The bill in this cause was filed by the wife against her husband, to obtain a divorce, on the ground of adultery. The defendant denied the material allegations in the bill. An issue was thereupon awarded, and was tried at the Albany circuit. The trial resulted in a verdict for the plaintiff. The defendant having made application to the chancellor to set aside the verdict, and for a new trial, an order was made on the 6th of February, 1843, by which it was referred to Horace B. Webster, Esquire, a master in chancery, to take proofs upon the issue joined, as to the adultery charged in the bill against the defendant. In pursuance of this order, witnesses were examined before the master, and on the 25th of July, 1843, he reported the proofs to the court, with his opinion that the adultery charged against the defendant had not been proved. On the 4th of September, 1843, an order was made referring the cause to the vice chancellor of the third circuit, to hear and determine, with directions to decree a divorce, if he should be satisfied, from the evidence taken before the master, that the defendant had been guilty of the adultery alledged, and to dismiss the bill, if not so satisfied. The cause having been argued before the vice chancellor, a decree was made on the 25th day of June, 1845, dismissing the bill. From this decree the plaintiff appealed. The proofs taken before the master sufficiently appear in the opinion of the court.

M. T. Reynolds, for the plaintiff.

S. Stevens, for the defendant.

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By the Court, HARRIS, P. J. The parties to this suit were married in October, 1840. The adultery charged is alledged to have been committed with Jane Bruce, who is proved to have been a woman of abandoned character, and to have kept a house of prostitution. It is proved that, for a considerable period before the defendant's marriage, an intimacy had existed between him and Mrs. Bruce. At one time, for a month or more, she occupied a back room in his law office, where they both slept. Mrs. Bruce, who was examined as a witness for the defendant, herself states that the defendant had been in the habit of visiting her before his marriage. She says that "since the marriage he has had no intercourse with her," but she is emphatically silent as to the nature of their intercourse before. This intimacy does not seem to have been at all interrupted by the marriage. In the winter of 1841, but a few months after the defendant's marriage, we find him at the house of Mrs. Bruce, confined there by severe illness, which continued for several weeks. During this illness he was nursed by Mrs. Bruce, who occupied the same room with him. When his health became sufficiently restored to enable him to ride out, he and Mrs. Bruce went together to Chatham, a distance of some twenty miles, and he again returned to remain with her several days longer. After this, and up to the time of filing the bill in this cause, in September, 1841, the defendant continued his visits at the house of Mrs. Bruce, and, in several instances, is proved to have remained there all night. To this extent all the witnesses agree. Mrs. Bruce herself admits the intimacy, and that it continued. That there was an illicit connection before the marriage of the defendant can scarcely be doubted. Mrs. Bruce herself does not deny it. The fact that the previous intimacy was not interrupted after the marriage, leads almost irresistibly to the conclusion that the defendant's *ante nuptial* immorality was succeeded by *nuptial* infidelity. "Courts," said Lord Stowell in *Chambers v. Chambers*, (1 *Hagg. Cons. Rep.* 444,) "must not be duped. They will judge of facts, as other men of discernment do, exercising a sound and sober judgment, on circumstances that are duly proved before them." The same

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judge, in *Williams v. Williams*, (*Id.* 299,) said, "It is a fundamental rule of evidence upon this subject, that it is not necessary to prove the direct fact of adultery." In every case, almost, the fact is inferred from circumstances, *ex actibus propinquis*. "What are the circumstances which lead to such a conclusion," said the judge in the case last cited, "can not be laid down universally. The only general rule that can be laid down on the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." Upon these principles, if it be assumed, as I think it must, that before the defendant's marriage an illicit intercourse had existed between him and Mrs. Bruce, it is fairly to be inferred that such intercourse was continued afterward. Else why continue his visits to her house? Why leave his own wife and bed and seek the society and bed of a prostitute, if not to gratify his criminal purposes? It has been held that a wife's going to a brothel with another man, is evidence of adultery. (*Shelf. on Mar. and Div.* 409.) The reason is, that it is not to be conceived that a woman would go to such a place but for a criminal purpose. So, too, if a man go to a brothel and remain alone for a considerable time with a woman, it is sufficient evidence from which to infer adultery. "I will not say," said Lord Stowell in *Astley v. Astley*, (1 *Hagg. Ecc. Rep.* 714,) "that, if a married man goes to a brothel, he being perfectly aware of the nature of the house, it does not supply an equal presumption of guilt, as in the case of a woman. But supposing the court not inclined to push this presumption so far as to hold the proof conclusive, still it cannot be denied that such conduct furnishes a violent suspicion—a suspicion that must be rebutted, if rebutted it can be at all, by the very best evidence." In the case under consideration, the circumstances appear to me to raise so strong a suspicion of adultery, that I can scarcely conceive of evidence sufficient to rebut it. Certainly, it is not rebutted by the evidence in the case. On the contrary, the weight of the direct evidence goes very far, I think, to strengthen the presumption of the defendant's guilt. This will be manifest upon a brief review of the testimony.

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Colonel Hogan testifies that while the defendant was sick at Mrs. Bruce's house, in the winter of 1841, he frequently called to see him, and on one occasion he found the defendant in bed, and Mrs. Bruce in the same bed with him. She was in her night clothes, and the dress she usually wore was hanging on a chair. The bed they occupied appears to have been the only bed in Mrs. Bruce's apartments, except one up stairs, occupied by a small colored boy. Williams also testifies that he saw the defendant and Mrs. Bruce in bed together at the house in Union-street, while the former was there sick. It is true that Dr. Van Olinda thinks the plaintiff, while in Union-street, was too sick and feeble to have had sexual intercourse; but he admits that when he was sufficiently recovered to be able to ride thirty miles, his capacity to commit adultery might also be restored. The testimony of these witnesses, if it is to be credited, at least shows the degree of familiarity which at that time existed between the parties, and the abundant opportunity they had, if they possessed the inclination and ability, to indulge their criminal desires. The evidence does not warrant the conclusion that during the entire period of the defendant's cohabitation with Mrs. Bruce in Union-street, he was physically incapable of criminal connection. And if there was a time in the progress of his convalescence, when he was capable of such connection, we are bound, as I understand the rules of evidence applicable to the case, to infer such connection from the facts proved. "It is possible," says a learned writer, "that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such ground. Finding persons in such a situation as presumes guilt *generally*, they must presume it in all cases attended with those circumstances. They cannot adopt the extravagant professions of Platonism for the principles of their decisions." (*Shelford on Marriage and Divorce*, 408.)

Eliza Preston, a woman of ill fame, testifies that she hired a room of Mrs. Bruce, in Hawk-street, from the fourth of July until the latter part of September, 1841; that in the latter part of September she was in the bed room of Mrs. Bruce one evening

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and saw the defendant there in bed, and Mrs. Bruce sitting on the side of the bed ; that the defendant appeared as if he had been drinking a little too much ; that she remained in the room talking with him a little while and then left ; that she went to the room again the next morning and then saw the defendant in bed, and Mrs. Bruce getting out of the bed ; that she stepped back and waited until she thought Mrs. Bruce was dressed, and then returned. She then found Mrs. Bruce in the sitting room putting on her clothes, and the defendant still in bed. An attempt was made to show that Mrs. Bruce was absent from the city at the time spoken of by this witness, but I think the attempt must be regarded as unsuccessful. Mr. Betts, who was the agent of her landlord, proves that she was at home on the 30th of September, and, although other witnesses say she did not return until the early part of October, I think they are more likely to be mistaken than Mr. Betts, for he is guided in his recollection by his own entry of the receipt of the rent of the house. Martha McCabe, another occupant of the same house in Hawk-street, testifies that in the winter of 1842, she went into Mrs. Bruce's room one morning and saw her with the defendant, both undressed and in bed together ; that her own bed room joined that of Mrs. Bruce, and during the night she could hear them converse together ; that when she saw them in bed together she was called in by Mrs. Bruce, who requested that she should bring them some brandy ; that she took them the brandy, that both drank, as well as herself, and then both lay down again.

The testimony of either of these two witnesses is undoubtedly sufficient, if it is to be believed, to establish the charges against the defendant. They are, however, both of them women of bad character. Their own testimony furnishes proof of their degradation. Such testimony can not be received too cautiously, and perhaps ought not to be relied upon at all, except when sustained by other proof, or the circumstances of the case. And yet, in cases like this, there seems to be a kind of necessity for resorting to such evidence. *In re lupanari, testes lupanares admittentur.* Here the witnesses, though degraded, have stated

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nothing which we were not, from the admitted facts in the case, prepared to hear. The whole complexion of the case confirms all they have said. Some witnesses have been called to show that these women have made statements inconsistent with their testimony, but I have been unable to perceive any thing in the evidence introduced for this purpose, sufficient to convict them of an intentional disregard of truth. My own conviction, from a full examination of the whole case, is, that their testimony is substantially true.

The defendant has examined Mrs. Bruce herself, as a witness. Her testimony, like that of all the other witnesses who have any knowledge on the subject, shows the existence of a continued intimacy between her and the defendant after his marriage. But she says that "*since his marriage the defendant had never had any intercourse with her.*" She also denies that she ever slept in the same bed with the defendant in the house in Hawk-street. This testimony, though positive, I can not regard as sufficient to overcome the weight of evidence, direct and circumstantial, tending to establish the defendant's guilt. If the women whose testimony is directly opposed to her's, are unworthy of belief because they are prostitutes, her testimony is also affected by the same taint. Besides, she is *particeps criminis*, and, though a competent witness, her testimony is for that reason to be listened to with the greater caution. She testifies under strong inducements to deny her own guilt, and thus protect her friend and paramour. In *Astley v. Astley*, above cited, it was proved that Sir Jacob Astley had gone to a house of ill fame, and while there had gone up stairs with one Lucy Burbidge and remained alone with her at least a quarter of an hour. To rebut the presumption of guilt arising from this proof, Burbidge herself was called as a witness, and denied that while she was with Sir Jacob they committed adultery. The court said "it is impossible that we can give any credit to her denial. She is a witness not to be listened to." In this case, the inducements for Mrs. Bruce to conceal the defendant's guilt are so strong, that I can not see how she is to be believed, against the decided and unequivocal evidence in the case, forcing upon the

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mind a conviction of the defendant's guilt. Against all this evidence, her denial, however positive, can not be allowed to prevail.

I have thus referred to the principal points of the evidence bearing upon the main question. I do not deem it necessary to notice the other testimony more in detail. To me, the whole aspect of the case appears extremely unfavorable to the defendant. I find in it no circumstances of extenuation. The fact that before his marriage he was willing to harbor, in his own place of business, a notorious prostitute, furnishes strong evidence that he was then addicted to the most shameless debauchery. The fact that he is found leaving the innocent pleasures of his own bed, to associate with degraded women, shows that his marriage had wrought no change in his licentious habits. The fact that so soon after his marriage he is found abandoning the society of his youthful wife, and resorting to the house of prostitutes, is evidence of a degree of deliberate depravity, not often witnessed. In view of these general features of the case, and connecting the direct evidence with the defendant's general habits and conduct, as proved, I can not hesitate in the conclusion that the adultery charged is satisfactorily established. The decree of the vice chancellor should therefore be reversed, and the usual decree for a divorce entered.

WATSON, J. concurred.

PARKER, J. dissented.

Decree accordingly.

ALBANY GENERAL TERM, March, 1848. *Harris, Watson,
and Parker*, Justices.

VEDDER vs. ALKENBRACK.

The act of April 11th, 1842, to exempt certain property from distress for rent, and sale on execution, applies only to cases in which the debt was contracted after that statute took effect; and does not extend to debts contracted previous to its passage.

Accordingly *held* that the act did not authorize an execution issued upon a judgment recovered for the purchase price of property sold previous to the passage of that act, to be levied upon such property.

ERROR to the Schoharie common pleas. On the 25th of February, 1842, Thomas Smith sold to Vedder a stove and stove furniture, and took for them a promissory note. In May, 1843, a judgment was recovered by Smith against Vedder, on the note, before a justice of the peace of Schoharie county, on which an execution was afterwards issued to Alkenbrack, a constable, who levied on, and sold, the stove furniture. Vedder then sued Alkenbrack in trespass, in a justice's court, claiming that the stove furniture was exempt from execution, and recovered a judgment for the value. That judgment was afterwards reversed by the court of common pleas, and Vedder brought error to this court.

It was conceded that as "*necessary cooking utensils*," the property was exempt from execution prior to May 1st, 1842; and the question argued was whether by the act of April 11, 1842, it was made liable to execution on a judgment recovered upon a contract made prior to the time that act took effect.

M. Sanford & John Van Buren, for the plaintiff in error.

Thomas Smith & A. Taber, for the defendant in error.

By the Court, PARKER, J. . Before the exemption law, passed on the 11th of April, 1842, and which took effect on the 1st of May of that year, the property in question was exempt from

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execution. But the act of 1842, which extended the exemption law to additional property, subjected to an execution issued on a demand for the purchase money thereof, such additional property, and also all property previously exempt. The debt on which the execution was issued in this case was contracted on the 25th day of February, 1842, and the question presented is, whether the exemption law of 1842 is to be confined to cases in which the debt was contracted after that statute took effect.

If this were a new question, I should have no hesitation in holding that the statute was applicable as well to debts contracted before as after its enactment. I find nothing in the language of the act limiting its effect to executions on future contracts; and I can not think there is any rule of construction, or principle of law, authorizing such a conclusion.

The rule that requires a statute to be construed as prospective only in its operation, where a retrospective operation of it would work injustice, was very fully examined by Mr. Justice Bronson in *Sackett v. Andross*, (5 *Hill*, 334,) in which a majority of the court held it was inapplicable to the bankrupt law of 1841. I think the authorities and cases there cited, show the rule contended for to be equally inapplicable to the exemption act in question. Such a construction is not necessary to prevent injustice. As well might it be contended that every change in the practice of suits, whether made by statute or by rule of court, should only be applicable to suits growing out of contracts made before the change of practice was adopted. If the creditor may claim such a construction, so may the debtor; and it would therefore be applicable to all modifications in the practice, whether they hastened or retarded the time for obtaining judgment, for issuing execution, or doing any other act in the progress of collecting a debt; substituting eight days notice of trial instead of fourteen; prohibiting the issuing of execution till the expiration of thirty days after judgment; shortening or enlarging the time in which process may be made returnable, could, under such a construction, only be applicable to suits on demands existing before such changes of practice.

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It is not material in this case to inquire whether that part of the act of 1842, which extends the exemption to additional property, is void as impairing the obligation of contracts. I shall not, therefore, proceed to examine the authorities for the purpose of showing what I think to be the true doctrine, that that act is not in conflict with the constitution of the United States. Although I entertain very great respect for the reasoning, on that subject, of the learned judge in *Quackenbush v. Danks*, (1 *Denio*, 128,) yet I can not agree with him; and I think it will be eventually held that the exemption relates only to the remedy, and in no way impairs the obligation of the contract.

But in this case the property before exempt was subjected to execution by the act of 1842; and it can not be pretended that the obligation of the contract is impaired by adding to the means of enforcing it. This case must therefore turn entirely on the first question above stated, viz. whether the act must have a retrospective construction; and upon that point we are not without authorities. In *Quackenbush v. Danks* the question was presented whether the extension of the exemption to additional property, by the act of 1842, was applicable to executions for debts contracted before its passage, and the court held that the act was not retrospective, and that if so, it was unconstitutional as impairing the obligation of the contract. The judgment in that case was affirmed by the court of appeals. (3 *Denio*, 594.) I am told, however, that this affirmance was only by a tie vote; and if so, it adds but little, if any thing, to the weight of the authority. (7 *Hill*, 583, *note*, and *cases there cited*.) Upon which of the grounds the four judges who voted for affirmance, placed their opinions, I have not learned. If it was upon the latter ground, it would leave the other question, which alone affects this case, still open for revision.

The construction claimed by Mr. Justice Bronson in *Quackenbush v. Danks*, seems also to have been adopted by the late supreme court, in *Mathewson v. Weller*, (3 *Denio*, 52.)

As the adjudications now stand, on this point, I feel, therefore,

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bound by the force of authority to hold in accordance with these decisions.

The judgment of the common pleas must therefore be reversed, and that of the justice affirmed.

Judgment reversed.

ALBANY GENERAL TERM, May, 1849. *Wright, Harris, and Parker*, Justices.

MERRITT, ex'r, &c. vs. SEAMAN and others.

When a contract is made with an executor or administrator, personally, after the death of the testator or intestate, or where money is received by the person sued, after such death, the executor or administrator may sue either in his own name or as executor or administrator.

In a suit by an executor, upon a cause of action which arose after the death of the testator, the defendant can not set off a demand against the testator, even though it existed at the time of his death.

This rule applies to a note given to the executor, to settle a balance due on a note belonging to the estate, where the executor declared on promises to himself only, and gave notice that the note was the only cause of action.

Where, in such case, the defendant sought, on the trial before a referee, to set off an account against the testator, and it was objected to by the plaintiff, "that such proof was incompetent under the circumstances of the case," and the objection was overruled, and the set-off allowed, it was held that the grounds of objection not having been especially stated, a new trial could not be granted.

It is a rule applicable as well to cases as bills of exceptions, that a party shall not be permitted, on a motion for a new trial, to avail himself of an objection made on the trial, unless the ground of objection was so particularly stated as to enable the opposite party to supply, if possible, the alleged defect, or to take such steps as would secure himself against loss.

The fact that the defendants had previously rendered accounts that had been paid by the testator, raises no presumption against the allowance of the accounts attempted to be set off, consisting of previous charges, where it appears that the former were for disbursements only, and the latter for services.

Nor does the note in suit raise any presumption against the account sought to be set off, if it appears that the parties agreed, when the note was given, that it should not prejudice the plaintiff's claims.

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MOTION to set aside the report of a referee. This was an action of assumpsit. The declaration contained the common money counts, alledging promises to the plaintiff. There was no count on promises to the testator. Annexed to the declaration, was a copy of a promissory note, and a notice that it constituted the only cause of action. The following is a copy of the note.

"\$878,11.

New-York, Sept. 14, 1844.

One day after date, we promise to pay to the order of C. H. Merritt, Esq. ex'r of est. of John Sampson, eight hundred seventy eight dollars eleven cents, value received, with int. from date.

SEAMAN & BROTHERS."

The defendants pleaded the general issue and gave notice of set-off. The cause was referred to H. P. HUNT, Esq. sole referee. On the hearing before the referee, it was admitted that the defendants had been in partnership under the name of "Seaman & Brothers," and that the note in suit was given for the balance of a loan made by the testator in his lifetime, to the said firm, and not to close other transactions between the parties. The defendants, by way of set-off, claimed to recover commissions for services as agents of John Sampson, in collecting and paying over rents, and superintending repairs of certain houses, belonging to said Sampson, in the city of New-York. The account accrued between 1836 and 1842, and, including interest, amounted to \$2961,88. John Sampson resided at Troy, and the defendants in the city of New-York. In support of this account, the defendants proved that they had acted as agents for John Sampson, in collecting and paying over his rents for the time aforesaid, and that five per cent was the customary commissions allowed for such services. This evidence was taken "*subject to plaintiffs' objection, that such proof was incompetent under the circumstances of the case.*" The plaintiff offered in evidence eleven bills, rendered against said John Sampson, receipted by the defendants. The date of the first bill was in 1837, and of the last in 1845. These bills contained no charge, except for disbursements made from time to time by the defendants, for the plaintiff. The plaintiff

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also objected that any evidence tending to charge the plaintiff with commissions after the accounts were proved to have been rendered, was inadmissible, but the objection was overruled. In support of the charge for commissions, the defendants introduced in evidence several letters, written by John Sampson to John F. Seaman, one of the defendants. These letters were objected to by the plaintiff, for the reason stated, and also because they were addressed to one of the defendants individually, and not to the firm. The plaintiff's counsel offered to prove, by a merchant residing at Troy, that it was the custom of merchants and agents doing business for a commission, to charge over and deduct their commissions from the moneys received, annually or periodically, when they rendered their accounts. This proof was objected to by the defendants' counsel, and was excluded. The defendants also introduced evidence for the purpose of proving an account for moneys advanced by request of the testator to his nephew, John Sampson, jr. who had been a clerk in the defendants' employment. This account was made out at \$429,37. John Sampson, jr. died in June, 1845, and it was admitted that after the plaintiff refused to pay this account, it had been presented to the administrator of John Sampson, jr. for payment. It was also proved that when the note in suit was given, the defendants claimed to have an account against the estate of the testator, and that the plaintiff told them to make out their account, and agreed that the giving of the note should not prejudice the defendants' claim. The testator died in the spring of 1844.

The referee reported due from the plaintiff to the defendants, \$1462,61, and the plaintiff now moved to set aside the report.

Job Pierson, for the plaintiff.

D. Buel, Jr. for the defendants.

By the Court, PARKER, J. The plaintiff had a right to sue on the note in question in his own name, or as executor of John Sampson deceased. (*Mercein v. Smith*, 2 Hill, 210. *Colby v.*

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Colby, 2 *New Hamp. Rep.* 420. *Biddle v. Wilkins*, 1 *Peters*, 686. *Mowry v. Adams*, 14 *Mass. Rep.* 327.) In the latter case Chief Justice Parker says, "It is now settled that when a contract is made with an executor or administrator personally, after the death of the testator or intestate, or where money is received by the person sued, after the death; in such cases the executor or administrator may sue either in his own name or as executor or administrator." He brought the suit as executor; and it is provided by statute, (2 *R. S. 2d ed.* 278, § 38,) that whenever a set-off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative character, and shall be evidence of a debt established to be paid in the course of administration. This provision extends to all suits brought by executors in which a set-off is established, including suits that might also have been instituted in the name of the executor personally. But it is contended that the set-off was improperly allowed by the referee. The rule is undoubtedly well established, that in a suit by an executor or administrator, upon a cause of action which arose after the death of the testator or intestate, the defendant can not set off a demand against the testator or intestate, even though it existed at the time of his death. (*Dole v. Cook*, 4 *John. Ch.* 13. *Root v. Taylor*, 20 *John.* 13. *Fry v. Evans*, 8 *Wend.* 530. *Mercein v. Smith*, 8 *Id.* 210.) The reason given is, that as the law existed previous to the revised statutes, a defendant, by such a set-off might compel the payment of a simple contract debt in preference to a judgment or bond debt. And since the revised statutes, such a set-off might, if the estate should prove insolvent, prevent a *pro rata* distribution. Such would be its effect where a suit is brought by an executor, as such, to recover money received by a defendant since the death of his testator and belonging to his estate. If in such case the defendant is at liberty to set off a debt due him from the testator at the time of his death, he might succeed in obtaining payment of all his demand when there were not sufficient assets to pay all the creditors. The consequence would be the same if a defendant were allowed to set off his claim against the estate, in a suit brought

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against him to recover money belonging to the estate, loaned to him by the executor.

The statute, in its terms, (2 R. S. 2d ed. 279, § 37,) seems to be broad enough to admit a set-off in all suits brought by executors and administrators: but the construction that has been given to it by the courts is now too well settled to be questioned, and is clearly necessary, as well since as before the revised statutes, to give effect to the policy of the law in regard to the distribution of estates.

The objections above stated might not however apply to the note in question; for although it was made after the death of the testator, it was given only for a balance due the estate. The transaction was no more in fact than a liquidation of a demand due the estate, and a promise to pay the balance. If this suit had been brought on the original demand for which this note was given, the right of set-off could not be questioned. But this view of the case does not relieve the defendants from difficulty. They consented to give the note in question in such a form as would have entitled the plaintiff to sue on it in his own name; and it will not be pretended that if he had done so, the defendants could have made the set-off. The plaintiff did not do so, but he chose to sue on it as executor, and to put in issue only promises made to himself as executor, and by his notice subjoined to his declaration to make the note in question his only cause of action. I think, therefore, the plaintiff had a right to object on the hearing to the allowance of the set-off, on the ground that the cause of action, in the form given to it by the consent of parties, arose after the death of the testator.

The next question to be considered is, whether the objection to the admission of the set-off was properly made. The objection to the admissibility of evidence in support of the set-off was "*that such proof was incompetent under the circumstances of the case.*" It could not have been made in more general language; and it is now urged that the ground of the objection should have been specifically stated, to entitle the plaintiff to avail himself of it on this application.

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It is a salutary rule, and applicable as well to cases as bills of exception, that a party shall not be permitted, on a motion for a new trial, to avail himself of an objection made on the trial, unless the ground of objection was so particularly stated as to enable the opposite party to supply, if possible, the alleged defect. (*Van Gordon v. Jackson*, 5 *John*. 467. *Frier v. Jackson*, 8 *Id.* 507. *Jackson v. Caldwell*, 1 *Cowen*, 622. *Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 407. *Willard v. Warren*, 17 *Wend.* 257. *Thurman v. Cameron*, 24 *Id.* 87. *Ryerss v. Wheeler*, 25 *Id.* 437. *People v. Bodine*, 1 *Denio*, 281. *Williams v. Larkin*, 3 *Id.* 114. *Gillett v. Campbell*, 1 *Id.* 520. *Underhill v. Pomeroy*, 2 *Hill*, 603.) It is due to the party offering the evidence that he should understand distinctly the ground of objection. He may choose to acquiesce in its correctness and withhold the evidence. He may introduce other equivalent evidence, not liable to the objection. If it be on the ground of a defective pleading, he may perhaps obtain leave to amend. If the objection go to the entire exclusion of a demand offered by way of set-off, he may withdraw it and bring a cross action. It is equally due to the tribunal before which the trial is had, that the ground of objection should, in all cases, be frankly and specifically stated. The court and party have a right to suppose that a ground of objection, not thus pointed out, is waived. There has been no disposition evinced by the courts to relax this rule, and I think justice and public policy require that it should be rigidly adhered to. The case of *Underhill v. Pomeroy*, above cited, was an action brought to recover for services performed under an agreement that they should be paid for *in goods*; and the declaration contained only the common money counts. On the hearing before the referees, the defendant objected, "*that the proof did not sustain the declaration, and that upon the testimony the plaintiff was not entitled to recover.*" It was held this objection was too general to raise the question whether the plaintiff could recover without declaring specially. This case was affirmed on error in the late court for the correction of errors, and so far as I can gather from

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the briefly reported opinions of senators, I think the decision is placed on the same ground as in the supreme court.

There, as in this case, it might not have been in the power of the party to obviate the objection on the trial, if it had been specifically made. But a knowledge of the true ground of objection, if it was deemed to be well taken, might have enabled him to take such steps as would have secured himself against loss. In the case we are considering, the demands sought to be set off, if rejected, are now barred by the statute of limitations. If the true ground of objection had been frankly stated, at the trial, the defendants might have withdrawn their set-off, and have saved their demands by bringing a cross action. I think, on the whole, it is fair to say that the objection was too general, and that the plaintiff can not now, for the first time, avail himself of a ground for excluding the defence, not pointed out on the trial.

At another stage of the trial, the plaintiff objected to the evidence tending to charge the plaintiff with commissions, on the ground that accounts had previously been rendered by the defendants which had been settled and paid by the testator. This objection was not well taken. Such previous accounts were for disbursements only, and their payment furnished no presumption that the services performed were not also to be paid for. (*Pringle v. Clenahan*, 1 *Dallas*, 486.)

The objection to the introduction of the testator's letters to John F. Seaman was equally untenable. The written declarations of the testator, no matter to whom made, were clearly admissible so far as they referred to the matters in controversy; and it was a question of fact for the referee to settle, on all the evidence, whether the services sought to be set off were rendered by John F. Seaman alone, or by all the defendants. Nor does the giving of the note raise any presumption against the defendants' set-off; it being proved that the parties agreed, when the note was given, that it should not prejudice the defendants' claim.

It is unnecessary to examine fully the other less important exceptions taken by the plaintiff on the trial, or the questions

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of fact decided by the referee. The points now made by the plaintiff can not be sustained, and the motion to set aside the report of the referee must therefore be denied.

HARRIS, J. concurred.

WRIGHT, P. J. dissented.

Motion denied.

SAME TERM. *Before the same Justices.*

GRANT vs. JOHNSON.

G., in consideration of \$950, to be paid by J., as follows: \$200 on the 1st of April, 1846; \$200 on the 1st of April, 1847; and the remainder in two equal annual payments thereafter, agreed to sell to J. a certain piece of land, and covenanted to give possession on the 1st of November, 1845, and to convey by deed on the 1st of May, 1846, "if the above conditions are complied with." G. gave possession of the premises, and J. paid the first installment. In an action by G. to recover the \$200 due on the 1st of April, 1847, J. pleaded that he was ready and willing to accept a deed, and requested G. to execute it, but that he did not, on the 1st of May, 1846, or at any time afterwards, execute and deliver to J. a good and sufficient deed, but neglected and refused to do so; *Held*, on demurrer, that a tender of a deed by G. was not a condition precedent to the payment of the second installment; and that G. was entitled to judgment.

COVENANT upon an agreement, which is set out at length in 5th Barbour's Sup. Court Rep. 162, where will be found a report of this case when it was before the court on demurrer to the plaintiff's declaration. The facts set forth in the pleadings, on which the questions now decided arose, are sufficiently stated in the opinion of the court, which follows.

A. C. Niven, for the plaintiff.

G. W. Lord, for the defendant.

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By the Court, PARKER, J. When this case came before the court on demurrer to the declaration, on the ground that the plaintiff had not averred the tender or delivery of the deed, we decided that the agreement to pay the installment of \$200 on the 1st of April, 1847, was an independent covenant, and gave judgment for the plaintiff, with leave to withdraw the demurrer, and plead on terms. The defendant has now interposed four pleas, only one of which, (the last) concludes to the country. To the first and second pleas the plaintiff has replied, and demurrers are put in to the replications. The plaintiff has also demurred to the third plea of the defendant. It is now conceded that the first and third pleas are bad under the decision previously made in this cause; and it is only necessary for us to examine as to the sufficiency of the second plea, the replication to that plea being also admitted to be bad.

The second plea sets up that the defendant was ready and willing to accept a deed, and requested the plaintiff to execute it, which the plaintiff neglected and refused to do; and that the plaintiff did not, on the 1st of May, 1846, or at any time afterwards, execute and deliver to the defendant a good and sufficient deed, although often requested, &c. That the said defendant, on the 1st of April, 1846, paid the plaintiff the sum of \$200, which was accepted in full satisfaction and discharge of the first installment, and that the defendant did at all times well and truly perform and keep all the other clauses, articles, conditions, covenants, &c. in the said agreement contained.

Without stopping to inquire whether this plea is bad for duplicity, I will examine it as it is claimed to be by the counsel for the defendant. He contends that the only material part of the plea is the averment that the plaintiff neglected and refused to deliver a deed on the 1st of May, 1846, and that the other averments are merely inducement to the presentation of that point. This presents the question whether the tender of the deed was a condition precedent to the payment of the second installment.

It is the fact that such deed was not tendered that the defendant rests upon for his defence; and so far as the merits of this defense are concerned, it is immaterial whether the fact be pre-

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sented by an omission in the declaration or by an affirmative allegation in the plea. The point decided on the former demurrer was that the tender of a deed was not a condition precedent, but that the promise to pay the second installment was an independent covenant; and that same question is now again presented for decision. It is unnecessary, therefore, to do more than to refer to the opinion written on the former decision, for the reasons why the plaintiff is entitled to judgment. I will briefly, however, notice some of the positions of the counsel for the defendant.

The counsel is right in his statement that *Sears v. Fowler*, (2 *John. Rep.* 272,) and *Havens v. Bush*, (*Id.* 387,) were governed by the English decision of *Terry v. Duntze*, (2 *H. Bl.* 389.) But he is wrong as to the extent to which these cases are overruled in *Cunningham v. Morrell*, (10 *John.* 207.) In the opinion of Kent, Ch. J. in the last cited case, he says, "It becomes then our duty to *limit* the operation of that case, and of the two cases in this court which were founded upon it, so as better to fulfill the intention of the contract," &c. A brief reference to what was decided in these cases will show the propriety of such limitation and that it did not go so far as to reach the principle involved in the case we are considering. In *Terry v. Duntze* the plaintiff covenanted to finish a building by a given day, and the defendant was to pay the consideration by installments, *as the building should proceed*, in the proportion specified, and *the remaining part of the consideration when the building should be completed*. But because two several sums of money were to be paid before the whole was performed, the court held the covenants independent, and allowed the plaintiff to sustain his action for the entire consideration, without any averment of performance. So in *Sears v. Fowler* the plaintiff covenanted to build a house and to finish it by the 1st of Nov. 1805, in consideration of a certain sum of money, part of which the defendant agreed to pay on the 1st of May, 1805, and the residue *when the house was finished*. It was held that the completion of the house was not a condition precedent, but that the covenants were independent, and that the plaintiff might recover

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the consideration money without averring performance, and though the building was not finished at the time. And in *Havens v. Bush* the plaintiff covenanted to do a certain piece of work for \$700, in a certain time, and the defendant covenanted to pay the \$700, one half in cash and the other half in goods, *as the work progressed, and the whole when the work was done*. It was held the covenants were independent, and the plaintiff was allowed to recover the entire consideration money without averring performance.

It will be seen that in these cases there were no times fixed for the payment of the subsequent installments, but in all of them it was provided that the time of payment should depend on the completion of the work. The wonder is that a court should ever hold that in such a case the performance of the work was not a condition precedent to the payment. It seems to me the intention of the parties to make it such is clearly expressed.

In correcting the error into which the courts had fallen in these cases, it was manifestly the intention of the court, in *Cunningham v. Morrell*, not to interfere with the general rules laid down in the note to Saunders, (1 *Saund.* 320,) or the case of *Wilcox v. Ten Eyck*, decided by the same court, held by the same judges, only four years before. For Ch. J. Kent says that the fact that part of the consideration money was to be paid before the entire service was to be performed, might have made the covenants independent, though not "if the contract in all those cases had not provided that a certain part of the consideration was to be paid *on the completion of the service*, and which rendered the service *pro tanto* a condition precedent."

I am not aware that the case of *Wilcox v. Ten Eyck* has ever been questioned; and that, like this, was a case where part of the consideration was to be paid before the delivery of the deed, and the remainder at fixed times, and part of it, as in this case, after the time for the delivery of the deed. On the contrary, the principle recognized in *Wilcox v. Ten Eyck* has been frequently applied by the courts. (*Bennett v. Ex'rs of Pixley*, 7 *John.* 249. *Goodwin v. Holbrook*, 4 *Wend.* 377.

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Tompkins v. Elliott, 5 *Wend.* 496. *Dey v. Dox*, 9 *Id.* 132. *Harrington v. Higgins*, 17 *Id.* 376. *See also the cases cited in the former opinion of this court in the present case.*)

In *Wright v. Moore* it was plain from the agreement that the second installment was not payable till a deed had been executed; because the second and subsequent installments were to be secured by bond and mortgage, and they were to be executed on the delivery of the deed.

I think, therefore, the plaintiff is entitled to judgment on the demurrers to the replications to the first and second pleas, and on the demurrer to the third plea; and that the defendant should have leave to amend on payment of costs.

SAME TERM. *Before the same Justices.*

VAN VLECK vs. BURROUGHS and others. adm'rs. &c.

A justice of the peace has jurisdiction to try an action of trespass on the case for willfully neglecting or refusing to issue an execution on a judgment recovered before the defendant as a justice of the peace.

Where a creditor institutes proceedings before a surrogate, to compel payment of his demand, if the executors or administrators seek to avail themselves of the statute of limitations, they must state such defence in time to enable the creditor to meet it by proof. It is too late to do so when the cause is submitted on written points, after the evidence is closed.

In such proceedings before a surrogate, the parties ought to make statements of their claims in the nature of pleadings, in order that the parties may be apprized of the questions in issue.

The fact that executors or administrators have never advertised for the presenting of claims, does not entitle a creditor to recover costs in a suit brought against them. Costs can only be recovered where the claim has been presented and the payment has been unreasonably resisted or neglected, or where there has been a refusal to refer a disputed claim.

IN EQUITY. On the 16th of November, 1835, Horatio W. Orcott recovered a judgment before John Dewey, Esq. a justice

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of the peace of Greene county, against William Burroughs, for damages and costs \$25,20, and on the same day Orcott assigned the judgment to John Van Vleck, Esq. On the 24th of the same month, an affidavit was made and bond executed in behalf of Burroughs, and a certiorari allowed, for the purpose of removing that judgment to the court of common pleas of Greene county. On the 29th of November, 1835, William Burroughs died. The certiorari and accompanying papers were served on the justice on the 7th December, 1835, and, together with the return of the justice, were filed in the county clerk's office on the 14th of December, 1835. Letters of administration were granted to the administrators of William Burroughs, deceased, on the 7th of March, 1836. In January, 1841, Mr. Van Vleck made an affidavit, and served on K. Van Dyke, Esq. the attorney who brought the certiorari, a copy thereof, with notice of motion, and on the 9th of September, 1841, made a motion in the court of common pleas, which was opposed by Van Dyke by affidavit. On that motion a rule was entered in the court of common pleas directing the writ of certiorari to be dismissed with costs. The bill of costs for arguing the certiorari was taxed at \$20,21, and the costs of the motion to dismiss the same were taxed at \$8,26. No order for creditors to exhibit claims was ever granted by the surrogate of Greene county, to the administrators.

On the 16th of July, 1844, on a petition presented by Mr. Van Vleck, to the surrogate of Greene county, a citation was issued to the administrators of William Burroughs, calling on them to account, returnable 19th of August, 1844. On that day Mr. Van Vleck appeared, by his counsel, and the administrators appeared by K. Van Dyke, Esq. as their counsel, and the proceedings were adjourned from time to time until the 9th of September, 1844, when the surrogate proceeded to hear the proofs and allegations of the parties. The administrators then admitted that there were sufficient assets in their hands to pay Van Vleck's claim and costs. The facts above stated were then proved before the surrogate. The cause was then submitted by the parties on written points. In the points submitted by

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the administrators they claimed, among other things, that the demand in question was barred by the statute of limitations. The surrogate decreed that the claim of Van Vleck, on the judgment, and the costs of arguing the certiorari, were not a legal claim against the estate of Wm. Burroughs, and rejected the same, but directed the costs of motion, \$8,24, to be paid by the administrators, out of the estate. The surrogate also charged Van Vleck with the surrogate's fees, being \$14,25, and also with his attorney's costs, and witnesses fees, \$44,67, and directed the administrators to pay the costs of the attorney, and charge them to the estate.

This decree was made on the 26th of December, 1844. Van Vleck appealed from it to the late court of chancery.

S. Stevens, for the appellant.

H. Hogeboom, for the respondents.

By the Court, PARKER, J. The question whether the surrogate's court was a proper tribunal to try the validity of the appellant's claim, was not raised before the surrogate, nor on the hearing of the appeal before the court. I shall not, therefore, express any opinion upon that question, but considering the parties as having agreed in regard to it, shall proceed to examine the case upon the merits.

It is first objected by the respondents that the justice had no jurisdiction of the subject matter of the suit brought by Orcott against Burroughs, and that therefore the judgment was void. That suit was a special action on the case for willfully neglecting and refusing to issue an execution on a judgment recovered before the defendant as a justice of the peace. The justice had, by the second section of the statute relative to courts held by justices of the peace, jurisdiction of all actions of trespass on the case, which were not excepted in the fifth section. (2 R. S. 325, 3d ed.) The fact that the trial of a cause involves an inquiry into the official conduct of the defendant, as a justice, is no where declared an exception, nor has it ever been regard-

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ed as an objection to the jurisdiction. In *Tompkins v. Sands*, (8 *Wend.* 462,) an action on the case was brought before a justice of the peace against the defendant, who was also a justice of the peace, for refusing to take bail on appeal from a judgment rendered by him, and the supreme court held the action maintainable. The judgment, therefore, when recovered before Justice Dewey, and assigned to the appellant, was a valid demand against Burroughs; and not having been subsequently reversed, it remained after his death a legal claim upon his estate.

I do not think the respondents are at liberty to avail themselves of the statute of limitations. No such defense was interposed before the surrogate, nor was any thing said on the subject till after the proofs were closed and the cause was submitted. Then the respondent took the objection for the first time, in the written points submitted by him to the surrogate. If such a defense was intended, it should have been stated in time to enable the appellant to meet it with farther evidence. Such is the well settled rule in courts both of law and equity, and there is no reason why it should not apply to proceedings before a surrogate. There, as well as in other courts, the parties ought to make statements of their claims in the nature of pleadings, in order that the parties may be apprized of the questions in issue. (*Foster v. Wilbur*, 1 *Paige*, 540.)

In this view of the case it is unnecessary to inquire as to the validity of the certiorari. Whether the certiorari was void because not served before the death of Burroughs, or whether it was valid until subsequently dismissed for want of prosecution—in either case the judgment rendered by the justice was in full force at the time of the hearing before the surrogate. It was a legal demand against the estate, and the respondents having admitted sufficient assets, I think the appellant was entitled to a decree for payment.

But I do not see upon what principle the costs of the certiorari suit, or of the motion to dismiss it, are chargeable to the estate. The former were never adjudged to be paid by any person, no judgment ever having been entered in the common

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pleas. The only legal costs awarded in that court were the costs of the motion to dismiss the certiorari, and they were not adjudged to be paid out of the estate. On the contrary, the administrators of Burroughs were never parties to the suit in the court of common pleas, and even if the administrators had been substituted as parties in the place of Burroughs, and judgment of affirmance had been rendered against them on the certiorari, no costs would have been adjudged either against them personally, or against the estate. (2 R. S. 511, § 17.) It is only "for wantonly bringing a suit, or for unnecessarily suffering a nonsuit or non pros, or for bad faith in bringing or conducting a cause," that the defendant can recover costs against executors or administrators.

The decree of the surrogate should only have provided for the payment to the appellant of the judgment recovered before the justice, viz. \$25.20, and interest since the 14th November, 1835; and neither party was entitled to recover any costs before the surrogate. If, instead of citing the respondents before the surrogate, the appellant had commenced a suit against them in a court of record, to recover the amount of the justice's judgment, he would not have recovered costs of suit. The fact that the respondents had never advertised for the presenting of claims did not entitle the appellant to recover costs of suit. Costs can be awarded against an executor or an administrator only when the claim has been presented and payment has been unreasonably resisted or neglected, or when there has been a refusal to refer, on the claim being disputed. (2 R. S. 88.) *Harvey v. Stillman*, (22 Wend. 271,) relied on by the appellant's counsel, has been overruled by *Bullock v. Bogardus*, (1 Denio, 276,) and *Knapp v. Curtiss*, (6 Hill, 386.) If the creditor is at liberty to select the surrogate's court as the forum for the trial of his claim against the estate, (and that question is not here presented for our decision,) he must abide by the same rule as to costs that would have governed if the suit were brought in a court of record.

The decree of the surrogate must be modified accordingly, and neither party is entitled to costs of this appeal.

SAME TERM. *Before the same Justices.*

TRUSCOTT and others vs. KING.

A judgment or mortgage may be taken to cover future liabilities and advances.

The person taking such security will be protected, whether the arrangement appears on the face of the papers, or rests in parol.

A judgment may be confessed to R. S. W. to cover future advances to be made by R. S. W. & Co.

Where a subsequent mortgage creditor files a bill to set aside such judgment, and alleges that it was confessed to secure R. S. W. for future advances made by him, and the answer does not allege that any other person than R. S. W. was interested in such security, the plaintiff can not avail himself of the variance.

A record of a mortgage under the recording act of New-York is notice to a subsequent purchaser, but does not affect a prior purchaser or incumbrancer. The act is prospective, not retrospective, in its operation.

A judgment to cover future advances was docketed 14th of October, 1835, a mortgage to another creditor was recorded 16th of October, 1837, after which date most of the unpaid advances by the judgment creditor were made. *Held* that the recording of the mortgage was not constructive notice to the prior judgment creditor: and *held also* that such judgment creditor was to be protected in his advances made after the recording of the mortgage and before he had actual notice of such mortgage.

IN EQUITY. This was an appeal from a decree made in the late court of chancery by the vice chancellor of the 8th circuit. On the 22d of April, 1835, Russell S. Brown and Rodman Starkweather confessed a judgment in the supreme court of this state to Richard S. Williams, on a bond and warrant of attorney, for forty thousand dollars of debt, and \$18,79 costs, which judgment was entered and docketed on the 14th of October, 1835. This judgment was given to secure an indebtedness then existing to, and advances thereafter to be made by, the firm of Richard S. Williams & Co. On the 15th of September, 1837, Russell S. Brown executed to George Truscott and John C. Green a bond conditioned to pay \$50,000. And to secure the same said Brown and Rodman Starkweather and wife executed to Truscott and Green a mortgage on real estate in the city of Buffalo. The mortgage was recorded on the 16th of October, 1837. This mortgage was assigned to Janet Stretch,

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and was foreclosed by bill in chancery. Pending the foreclosure suit Brown died, leaving a will, by which he devised his property to Starkweather. The suit was revived, and a decree for sale made on the 9th of December, 1845. After the death of Brown, Williams revived his judgment, by *scire facias*, on the 1st of January, 1845. He afterwards assigned said judgment to King, the defendant, who issued an execution thereon, and sold the premises in question, (being the same real estate covered by the mortgage,) on the 4th of August, 1845, which were bid in by the defendant King. Neither Williams nor King were made parties to the foreclosure suit. It was proved that at all times after the giving of the judgment there was due to Richard S. Williams & Co. over \$20,000 for advances made to Brown & Starkweather. That on the 20th of February, 1839, on a settlement between Williams & Co. and Brown & Starkweather, there was found due to the former \$22,742,26, and that there was over \$30,000 due on the judgment when it was assigned to King. Most if not all the indebtedness due upon the judgment, at the time of the assignment, accrued for advances made after the 16th of October, 1837.

The plaintiffs prayed that their mortgage might be declared a prior lien; that the judgment might be adjudged void as against the claim of the plaintiffs; and that the defendant might be perpetually enjoined, &c. &c.

The cause was heard on pleadings and proofs before the vice chancellor, who made a decree dismissing the bill with costs; from which decree the plaintiff appealed.

A. Taber, for the appellants.

M. T. Reynolds, for the respondent.

By the Court, PARKER, J. The law is now well settled that a judgment or mortgage may be taken to cover future liabilities and advances. (5 *John. Ch. Rep.* 326. 6 *Id.* 281, 288. 5 *Coven*, 441. 16 *John.* 165. 3 *Paige*, 614. 1 *Sandf. Ch. Rep.* 44. 1 *Pet.* 386. 1 *Pick.* 398. 10 *Id.* 199. 24 *Id.* 270.

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6 *Watts*, 57. 1 *Id.* 135. 1 *Pet.* 448. 4 *Kent's Com.* 175.) It appears as well by the pleadings as by the proofs, that the judgment confessed by Brown & Starkweather to Williams was given to secure an indebtedness then existing, and also advances thereafter to be made. Whether this arrangement between the parties appeared on the face of the papers, or rested in parol, is not material. No objection was made to the evidence; and if made, it would not have been tenable. (*Shirras v Cray*, 7 *Cranch*, 34. *Bank of Utica v. Finch*, 3 *Barb. Ch. Rep.* 303.) Nor does it invalidate the claim of the judgment that it was confessed to R. S. Williams for the benefit of R. S. Williams & Co. Such a practice is also permissible. (24 *Pick.* 270.)

But it is said that we must disregard the evidence that the judgment covered the liabilities of Williams and his partner, because no such fact was alledged, or put in issue. The bill alledged that the judgment was to cover future advances made by Williams, and the answer claimed that it covered future and existing advances. Neither party to this suit seems to have been aware that the partner of Williams had any interest in such advances, or in the security taken. No objection, however, was made to proving the consideration of the judgment, on this ground. I do not think this objection ought now to be sustained. Substantial justice between the parties will best be administered by disregarding it. The plaintiff has not been surprised; and if necessary, an amendment of the answer might now be allowed, so as to make the proof taken unobjectionable. But I think this is unnecessary; especially as the first allegation, now claimed to be erroneous, was made by the plaintiff. Besides, it is strictly true, as the parties agree in their pleadings, that the judgment was for the benefit of Williams. And it does not at all affect the real question in litigation that another person was also interested.

This brings me to the consideration of the principal question in this cause. The judgment was docketed October 14, 1835. The plaintiffs' mortgage was recorded October 16, 1837, after which date most, if not all, of the unpaid advances were made.

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Neither Williams nor King had any notice of the mortgage, unless the recording of the mortgage was constructive notice.

The recording act declares that every conveyance, not recorded, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded. (2 *R. S.* 3d ed. 40.) The record is constructive notice to a subsequent purchaser, but it in no wise affects a prior purchaser or incumbrancer. It is prospective, not retrospective, in its operation. (1 *Sandf. Ch. Rep.* 419. 3 *Id.* 193. *Stuyvesant v. Hall*, 3 *Barb. Ch. Rep.* 151.) A different doctrine had been supposed to be recognized by the chancellor in *Guion v. Knapp*, (6 *Paige*, 42,) but the erroneous impression derived from that case was fully and distinctly corrected by the chancellor in the recent case of *Stuyvesant v. Hall*, above cited.

I think it is therefore clear that the recording of the plaintiffs' mortgage was no notice to the previous judgment creditors. We are consequently to consider this case as if the mortgage had not been recorded. The advances, then, of the amount due on the judgment were made after the execution of the mortgage, but in entire ignorance of it. There was no notice either actual or constructive. Is the judgment creditor, in such case, to be protected in preference to the mortgagee? The plaintiff relies on cases which it is necessary to examine. In *Brinckerhoff v. Marvin*, (5 *John. Ch. Rep.* 327,) Chancellor Kent cited *Livingston v. McInlay*, (16 *John.* 165,) to show that a judgment, as well as a mortgage, may be held as security for future advances, and then added, "The limitation to this doctrine, I should think, would be that when a subsequent judgment or mortgage intervened, further advances, *after that period*, could not be covered." In supposed accordance with this dictum the counsel for the plaintiff contends that the mortgage was an intervening right, taking preference of the advances subsequently made on the judgment without notice to the judgment creditor. I do not think, however, it was intended by Chancellor Kent to lay down any such rule; nor did the case before him call for the decision of such a question. There is certainly no reason

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for making a distinction in this respect between a judgment and a mortgage, given to cover future advances. And the chancellor had immediately before, in the same opinion, cited with approbation two cases which show that notice was necessary, to give a second intervening mortgage a preference over a prior mortgage given to secure future advances. The first was *Gordon v. Graham*, (cited in 7 Vin. 52, E. pl. 3; S. C. 2 Eq. Cas. Ab. 598,) in which Lord Cowper held that if a clause be contained in a mortgage making it a security for future loans, subsequent loans will be taken as part of the original transaction, and paid before a second mortgage intervening with notice of the clause. The other case was that of *Shirras v. Cray*, (7 Cranch, 34,) where Ch. J. Marshall held that a mortgage given to secure future advances was a protection for all advances made prior to the receipt of actual notice of the subsequent title of the defendant. Chancellor Kent could not have intended to say, and did not say, that an intervening right was complete without notice. The same remark is applicable to what was said by the same distinguished jurist in *James v. Johnson*, (6 John. Ch. Rep. 429.) Nor did the question whether notice was necessary to make perfect an intervening right arise in the other cases relied on by the plaintiff's counsel, (1 Sandf. Ch. Rep. 45; *Id.* 314,) where the dictum of Chancellor Kent is repeated. In none of these cases has the question here presented arisen.

In *Gordon v. Graham* the law was carried, in favor of a prior incumbrancer for future advances, much further than the defendant claims here. There A. mortgaged his estates to B., to secure a sum of money already lent to A., and also all such other sums as should thereafter be lent or advanced to him. A. then made a second mortgage to C. for a certain sum, with notice of the first mortgage; and then the first mortgagee, having notice of the second mortgage, lent a further sum. Lord Cowper decreed that the second mortgagee should not redeem the first mortgage without paying as well the money lent after, as that lent before, the second mortgage was made; saying "it was the folly of the second mortgagee with notice, to take such security." It seems to me, however, that this decision goes to a

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questionable extent, and that the prior mortgagee ought not to be protected in making further advances after notice of the second incumbrance. The rule *qui prior est tempore potior est jure* is supposed to forbid such preference. (See *Powell on Mort.* 534, note E. *Boston ed.* of 1828.)

Even in England, where a mortgage gives a legal estate, and the doctrine of tacking obtains, the first mortgagee who lends money after the second mortgage made, and takes a judgment as security, is allowed to tack such judgment to his mortgage and protect himself against the second mortgagee only when the money was lent without notice of such second mortgage. (*Powell on Mort.* 525, 527, 557.)

But I think the law correctly laid down in *Shirras v. Cray*, cited above. I do not find that the authority of that case has been questioned, and it seems to me conclusive upon the point under examination. There can be no good reason for a different rule. The second incumbrancer has full knowledge of the terms and conditions of the prior incumbrance. The prior incumbrancer is ignorant of the second incumbrance. It is in the power of the second incumbrancer to give his lien a preference over future advances, by giving actual notice, and he should be required to do so; for without actual notice it is not in the power of the prior judgment or mortgage creditor to protect himself against loss. Unless actual notice is required, in such cases, neither a judgment nor a mortgage is of any value as security for future advances.

I think the vice chancellor was right in dismissing the bill with costs; and the decree must be affirmed with costs.

SAME TERM. *Before the same Justices.*

MAGEE, adm'r of Magee, vs. VEDDER.

6 358
8th 580
6b 352
16ap 36

8b 853
39 Mis 609

A surrogate has no power to decide upon the validity and amount of a claim against an estate, upon the petition of a creditor praying for a decree directing its payment, when such claim is disputed by the executor, and the right of the surrogate to make such a determination is denied.

THIS was an appeal from a decree of the surrogate of the county of Greene. On the 3d of April, 1841, Vedder presented to the surrogate a petition stating that he was a creditor of the estate of Ephraim Magee deceased, to the amount of about sixty dollars, and praying that the administrator might be decreed to pay the whole, or a proportional part, of such debt. The surrogate thereupon issued a citation requiring the administrator to appear before him on the 24th of May ensuing and render an account of his administration. At the time appointed, the parties appeared before the surrogate, and the administrator rendered his account, verified by his affidavit, in the usual form, and insisted that the surrogate had no jurisdiction to determine the validity of the respondent's claim, it being an unliquidated and disputed demand. The surrogate overruled the objection, and proceeded to try the validity of the claim, which was finally allowed at \$51.90. On the 21st of December, 1841, the surrogate made a decree directing the administrator, within thirty days, to pay the amount of Vedder's debt as settled by him, with interest; also the surrogate's fees, amounting to \$51.29, and Vedder's costs, including witnesses and attorneys' fees, taxed at \$75.19. From this decree the administrator appealed.

John Van Vleck, for the appellant.

H. Hogeboom, for the respondent.

By the Court, HARRIS, J. The question presented in this case is one of jurisdiction. It is, whether the statute has com-

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ferred upon the surrogate the power of deciding upon the validity of a claim against an estate, when such claim is disputed, and the right of the surrogate to make such determination, is also denied. Before considering this question it may be proper to state the facts upon which it is presented. The appellant was appointed administrator of the estate of Ephraim Magee deceased, in February, 1838. In December following he caused a notice to be published in the manner prescribed by law, requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to him at his dwelling house in Catskill, on or before the 15th day of June, 1839. The respondent omitted to present his claim. It is not alledged that the respondent ever exhibited the claim to the appellant, or requested him to pay it. The respondent's claim, as presented before the surrogate, consisted of a balance due upon a note against the deceased, dated in November, 1834, and a book account which accrued in 1835 and 1836. The first effort made by the respondent to obtain payment of his demand, so far as it appears from the surrogate's return, was the presentation of his petition on the 3d of April, 1841. The surrogate, notwithstanding the objection made to his jurisdiction, proceeded to determine upon the validity of the respondent's claim, and, after litigation before him, established it to the amount of \$51,90, and then made a decree against the appellant for the payment of this amount, together with all the costs of the proceedings, which were taxed by him at \$126,48, although the balance due from him to the estate as the account was settled by the surrogate, was but about \$72; thus in effect charging the appellant personally with the principal part of the costs. It is proper to add that a considerable part of these costs were incurred in the litigation of the appellant's account.

The question thus arises, whether the surrogate has been invested by the legislature with the power to adjudicate upon the validity and amount of contested claims against an estate, subject to his jurisdiction. I say *by the legislature*, for it will not be denied that all the powers of the surrogate are derived from that source. Whatever he does, beyond the express or

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clearly implied authority of statute, is beyond his jurisdiction, and void.

Upon a very careful examination of the provisions of the statutes in relation to the powers and duties of surrogates, and of executors and administrators, in respect to the creditors of an estate, I have become entirely satisfied that the legislature did not intend to confer upon the surrogate any such jurisdiction. It is certain that no such power is given in express terms; and upon comparing the various provisions of the statute with each other, I am equally certain that no such power was intended. The leading object of the legislature, apparent upon the face of every section of this carefully framed title of our statutes, is to effect a speedy settlement and distribution of estates, upon principles of equality, with the least possible expense either to the estate or to creditors, consistent with a faithful examination, on the part of the representative of the estate, into the fairness and validity of every claim against it. Hence, it is provided that at the end of six months from the time of his appointment, the executor or administrator may require the creditors of the estate, within a limited period, to exhibit to him their claims, with the vouchers thereof; and with a view to enable him to determine whether the claim is just and fair, he is authorized to require the claimant, not only to produce "satisfactory vouchers in support of the claim," but to superadd his own affidavit that the claim is justly due, that no payments have been made thereon, and that there are no offsets against it, to his knowledge. Having the claim thus before him, with the evidence upon which it rests, and proof, by the affidavit of the claimant, that there is nothing which ought in justice to defeat it, it becomes his duty, in the faithful discharge of his trust, to decide whether he will admit or reject the claim. If he is still in doubt as to its merits, an amicable reference is provided for, to determine the question. If he is satisfied that the claim is unjust, it is his duty to reject it, and then the claimant must bring his suit within six months, for the recovery of the claim, or his right of action will be barred. If the executor or administrator, when the claim is thus presented, or at least within a reasona-

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ble time thereafter, does not offer to refer the claim on the ground that he doubts its justice, or disputes it as unjust, it is to be deemed, I apprehend, a liquidated and undisputed debt against the estate. To protect the creditor against an arbitrary or unreasonable exercise of the power thus conferred upon the executor of determining whether a claim presented to him shall be litigated, the court in which the suit is brought is authorized, in case it shall appear that the demand was presented in time, and that its payment was unreasonably resisted or neglected, or that the executor or administrator refused to refer it, to charge the costs upon the executor or administrator personally, or upon the estate, as shall be just. This provision is made to secure the presentation and liquidation of all demands against the estate within eighteen months from the time of granting letters of administration or testamentary. The statute then proceeds to make provision for the settlement of the accounts of the executor or administrator and the distribution of the estate. And as the notice to creditors to exhibit their claims is not to be published until six months have elapsed from the time of granting administration, and as the creditor has six months from the time of the publication of such notice, to present his claim, and if disputed has six months further time within which he may bring his action, the statute, contemplating the possibility that there may be suits yet undetermined upon litigated claims, when the executor or administrator comes into the office of the surrogate for his final settlement, makes provision for retaining an amount sufficient to satisfy such claim, or its just proportion, in case of an eventual recovery. But of what avail are all these provisions, so admirably adapted to attain the end for which they were devised, if any one, making a claim upon an estate, however unjust or unfounded, may, at his pleasure, disregard them all, and without ever presenting his claim to the executor or administrator, may at any time, after six months shall have elapsed from the granting of letters testamentary or of administration, present his application to the surrogate for a decree directing the payment of his claim or a proportional part thereof, and thus compel the representative of the estate to liti-

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gate the claim before the surrogate, instead of referring the controversy to the more appropriate legal tribunals. There is nothing in the section of the statute under which such jurisdiction is claimed which, in my judgment, authorizes, much less requires, such a construction. It is true the surrogate, by the 18th section of the title which relates to the rights and liabilities of executors and administrators, is authorized, in his discretion, to decree the payment of *any debt* against the estate or a proportional part thereof; but it does not authorize him to try the validity of the debt. The debt must first have been established in some of the modes prescribed in the preceding provisions. The surrogate may, doubtless, upon an application under the section referred to, determine the fact whether the applicant has a debt which has been established. Thus, if it is made to appear that the claim has been presented to the executor or administrator and that he has either directly admitted it or failed to dispute it, or that a judgment has been recovered upon the claim against the estate, the surrogate may then proceed upon it as an *undisputed debt*. But, so long as the demand is in a condition to be contested by the executor or administrator, the surrogate will find in this section no authority to proceed.

The only section which seems to justify the surrogate in assuming the power of determining upon the validity of a debt, is the 71st section of the third title, (2 R. S. 95,) which provides that whenever an account shall be rendered and finally settled, if it shall appear to the surrogate that any part of the estate remains to be paid or distributed, he shall make a decree for the payment and distribution of what shall so remain, to and among the creditors, legatees, &c. and in such decree *shall settle and determine all questions concerning any debt*, claim, legacy, &c.; to whom the same shall be payable, and the sum to be paid to each. Considered by itself, the language of this section would seem to require of the surrogate the determination of the validity of all debts and claims existing against the estate at the time of the final settlement. And yet I apprehend that it was intended to impose no such duty upon the surrogate. I can not so well express what I regard as the manifest intention of the

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legislature in this respect, as by quoting the language of the late surrogate of New-York, in considering his own powers under this 71st section. "The words of this section," he says, "would appear to require the surrogate to settle, adjust, and determine upon the validity of all debts. But the statute must be taken all together, and effect must be given to all its provisions. If there are debts which are doubtful, they are to be referred. If the justice of them is disputed, the creditor must sue for them. Having pointed out these remedies, the legislature never could have intended by this 71st section to give the surrogate a right to decide upon the validity of such claims. What then does this 71st section mean, when it declares that the surrogate shall settle and determine all questions concerning any debt, claim, legacy, &c. ? It must be remembered that this section relates to the final settlement and distribution of the estate, *prior* to which, it is to be presumed that all the debts are ascertained. If there be any for which a suit is pending, by the 74th section the surrogate is to suffer the executor to retain in his hands moneys sufficient to pay such debts. It does not give the surrogate power to decide upon the validity of the debts in suit, and proceeds upon the ground that all disputed debts are in suit, because by a prior section the creditor is required to put them in suit within six months after the executor disputes and refuses to allow them. When, therefore, the 71st section declares that the decree of the surrogate shall settle and determine all questions concerning any debt, &c., *it does not mean that he is to determine the validity of the debts, but their priority, the amount due upon them, and to whom they belong, whether to the original creditor or to his assignee or his executor, &c.*" The opinion from which I have thus liberally quoted, was delivered in the matter of the estate of John Kent, deceased, and is found in the appendix to Dayton's Surrogate. It is true it is but the opinion of a surrogate ; but when that surrogate is *David B. Ogden*, whose legal eminence and virtues alike fit him to adorn the most exalted judicial station, the opinion, though it may not come to us with binding authority, can not fail to command the highest respect. In the same opinion, that distinguished jurist

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proceeds to vindicate his construction of the statute, by referring to the kindred provisions of the statute in relation to the sale of real estate for the payment of debts, in which it is expressly provided that any heir or devisee of the real estate may *contest* the validity and legality of any debts, &c.; and if, upon the hearing, any question arises which can not be satisfactorily determined without a trial by jury, the surrogate is authorized to award a feigned issue to try such question. (2 R. S. 102, §§ 10, 11, 14.) No such power having been given in express terms, in other cases, it is fair to presume that the legislature only intended to confer this jurisdiction upon the surrogate when application should be made for the sale of real estate for the payment of debts.

The same construction was given to the statute by Mr. McVean, the successor of Mr. Ogden, himself also an experienced officer and a sound lawyer. In the matter of the accounting of Jones, executor of John Mason, reported in 5 N. Y. Legal Observer, 124, he says: "The surrogate has not the jurisdiction to try or to establish a disputed debt, under any circumstances. Such jurisdiction is exclusively in the common law courts." All the surrogate can do in this respect is to determine the fact whether or not the debt has been established.

The only adjudged case with which I have met, which seems to conflict with this construction of the statute, is that of *Kidd v. Chapman*, (2 Barb. Ch. Rep. 414.) In that case a judgment had been recovered against the testator a few days before his death. After letters testamentary had been granted, the attorney of Chapman, the plaintiff in the judgment, called upon the executor, *with the judgment*, and requested payment. The executor promised to consult with his legal adviser that afternoon, and let the attorney know whether the judgment would be paid. Nothing more was done. More than eighteen months having elapsed after granting letters to the executor, Chapman presented to the surrogate his petition, *stating these facts*, and praying that the executor might be decreed to pay the amount due upon the judgment. Upon the return of the citation the executor appeared and disputed the debt, and insisted that the

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surrogate had no jurisdiction to decree payment, until it had been established upon a reference, or by judgment against the executor. The creditor, to obviate this objection, proved the circumstances in relation to the presentation of the judgment to the executor. The executor still insisted that the facts proved amounted to a rejection of the claim, and that not having been sued within six months after it was presented, it was barred by the statute. The surrogate overruled the objection, and made a decree for the payment of the judgment, with costs. Upon appeal the decree was affirmed with costs. It is not easy to see, from the chancellor's opinion in the case, the precise ground upon which his decision is founded. The surrogate decided that the claim had not been rejected. The chancellor sustained his decision. Whether or not the surrogate regarded what occurred when the attorney applied to the executor for payment as an admission of the demand, and therefore held that he had authority to proceed to make a decree for its payment as an undisputed debt, or whether, having merely decided that the debt had not been rejected by the surrogate, he had the power to proceed to try its validity, does not distinctly appear from the report of the case. Nor does it appear whether the chancellor regarded it as an established debt, or not. It is to be inferred, however, from the chancellor's language, that he regarded the surrogate as possessing the power to determine upon the validity of a claim, upon the application of a creditor for a decree directing the payment of his debt; for he says, "it is in the discretion of the surrogate to determine whether he will, in the first instance, permit the claim to be litigated before him;" thus implying that, in the opinion of the chancellor, the surrogate would have jurisdiction of the matter if he should choose to entertain the litigation. In respect to the case before him, all he says is that *he thinks the surrogate had power to decree payment of the respondent's judgment*, although the executor did not ask for a final settlement of his accounts, and under the circumstances of the case it was the duty of the surrogate to make the decree. In the decision of the surrogate and the chancellor, upon the facts before them, I entirely concur. The facts proved

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amounted to an admission of the claim, sufficient to justify the surrogate in proceeding to make a decree for its payment as an undisputed debt. The claim, in the opinion of the chancellor, was not in fact controverted by the executor before the surrogate, and I think he was not at liberty to controvert it. Whatever may have been the views of the chancellor, in respect to the question now under consideration, he does not seem to have considered that question as necessarily involved in the decision of the case before him. I do not, therefore, regard the case as a judicial determination of the question. I do not think the chancellor himself so understood it. The case was properly decided, whatever construction may be given to the provisions of the statute in relation to the surrogate's jurisdiction to determine upon the validity of contested claims.

One other case deserves to be noticed in this connection. It is that of *Fitzpatrick v. Brady*, (6 Hill, 581.) A suit having been brought against the executor, upon a note made by his testator, the defendant pleaded a former adjudication of the surrogate against the validity of the note, upon a litigation before him, in bar. Upon demurrer it was held that the decision of the surrogate was not a bar to the action. The court do not seem to have had in view the distinction between the jurisdiction of the surrogate in respect to disputed and undisputed debts. Yet, I apprehend it is the only ground upon which the decision is sustainable. If the surrogate had jurisdiction to try the validity of the demand, and did try it, and decided that it was not a valid debt against the estate, upon what principle could another court entertain jurisdiction of the same question? The decision, in my judgment, can only be defended upon the ground that the surrogate had no power to decide upon the validity of a contested claim, and, if he undertook to make such a decision, he transcended his jurisdiction, and his decision was therefore not binding upon the parties.

After having so studiously provided for the speedy settlement of estates, without unnecessary expense, it never could have been intended by the legislature to allow the creditor the chances of a double litigation. If the surrogate, as well as the common

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law courts, has jurisdiction to try all contested demands, I see nothing to prevent an adventurous claimant from trying his fortune before both tribunals. The case of *Fitzpatrick v. Brady* decides that a decision against the claim, by the surrogate, is not a bar to an action at law. What then is to prevent the claimant from first proceeding before the surrogate, and that too without even exhibiting his claim before he institutes his proceedings, under the 18th section of the 5th title? If he succeeds there, the decision of the surrogate must be conclusive upon the executor or administrator, unless by possibility he, by an appeal, transfers the litigation to a court of equity. And on the other hand, if he fails, the decision of the surrogate is not to prevent his renewing the litigation in a court of law. No such inconsistency was ever contemplated by the legislature. No principle of construction requires that such an effect should be given to any provision of the statute. I have had frequent occasion to admire the ability with which the great work of the revision of our statutes in 1830 was accomplished. Among the labors of the revisers I have been accustomed to regard that which relates to the settlement of estates as standing pre-eminent. I find in it a complete, simple, efficient system of proceedings, from first to last, providing for every thing necessary to be done to secure to creditors, in the first instance, the full benefit of the estate, with the least possible delay and at the least possible expense; and then, to preserve what remains, unwasted by useless litigation, for those who may be entitled to enjoy it. I confess my reluctance to attach to a system so admirable in itself, by the construction necessary to sustain the decision which is the subject of this appeal, what I should regard as so radical an imperfection; unless constrained to do so by controlling authority, or the manifest intention of the legislature. I am not satisfied that either exists. The decree of the surrogate must therefore be reversed, but under the circumstances of the case, it might not be just to charge the respondent with the costs of the appeal. The decree may provide that the appellant retain his costs out of the estate in his hands.

SAME TERM. *Before the same Justices.*

TUTHILL vs. WHEELER.

In March 1845, the plaintiff entered into a contract with the D. and H. Canal Co., whereby he agreed *to take charge of, and navigate*, a boat, during the season, in conformity with the orders and directions of the company, and to hold himself accountable to them for any injury done to the boat. The company agreed to pay for every ton of coal delivered at R., by the boat, certain stipulated prices, reserving \$8 on each trip, towards the payment of the value of the boat, and when the sums so reserved should amount to \$225 and interest, a title was to be given to the plaintiff, for the boat. But in case of failure to pay for the boat, as stipulated, or the termination of the agreement by the company whilst the value of the boat, and the interest, remained unpaid, then the sums reserved were to accrue to the company *for the use of the boat*. The company also reserved the right *to terminate the agreement, at pleasure*, and to take the absolute possession of the boat, &c. Under this contract, the plaintiff ran the boat through the season, and then laid it up in the canal; having paid \$136 towards the purchase of the same. The boat, while thus laid up, being levied upon by a tax collector, and sold, as the property of the D. and H. Canal Company; *Held* that the plaintiff had not such an interest in the boat as would enable him to maintain an action of trover therefor, against the collector.

To enable a person to maintain an action of trover by virtue of a special property in the thing taken, he must have an absolute vested interest in it.

THIS was an action of trover to recover the value of a canal boat. It was tried at the Sullivan circuit, in September, 1846, before BARCULO, Circuit Judge. It appeared upon the trial that on the 1st day of March, 1845, the plaintiff entered into a contract with the Delaware and Hudson Canal Company, whereby he agreed *to take charge of, and navigate* the boat in question, during the season of navigation, in conformity with the orders and directions of the company, and to hold himself accountable to the company for any injury done to the boat. The company, on their part, agreed to pay for every ton of coal delivered at Rondout by the boat, certain stipulated prices, reserving eight dollars on each trip of the boat towards the payment of the value of said boat, and when the sums so reserved should amount to \$225 and the interest thereon, a title was to

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be given to the plaintiff for the boat ; but in case of failure to pay for the boat, as stipulated, or the termination of the agreement by the company, whilst the value of the boat and the interest remained unpaid, then the sums reserved were to accrue to the company *for the use of the boat*. The company also reserved the right *to terminate the agreement at pleasure*, and to take the absolute possession of the boat, and to transport it with the cargo on board, to its place of destination, at the plaintiff's expense. Under this contract the plaintiff ran the boat through the season, and at the close of navigation laid it up in the canal, in the town of Lumberland. He had paid during the season, towards the purchase of the boat, \$136. The defendant was collector of the town of Lumberland, and as such collector held a tax warrant, by virtue of which he was directed to collect of the Delaware and Hudson Canal Company \$969, for the tax assessed upon that part of their canal, within the town of Lumberland ; and by virtue of such warrant, the defendant levied upon, and on the 27th of February, 1846, sold the boat in question.

The plaintiff having rested, upon this evidence, the defendant moved for a nonsuit, upon two grounds. 1. That the plaintiff, at the time of the seizure and sale of the boat, had no such property in the boat as would enable him to maintain his action of trover ; and 2. That at the time of the seizure and sale, the boat was in the actual possession of the company and was therefore liable to be seized and sold for the tax mentioned in the warrant. The circuit judge decided that the plaintiff could not maintain the action, and directed a nonsuit to be entered ; which the plaintiff moved to set aside.

J. W. Brown, for the plaintiff.

G. W. Lord, for the defendant.

By the Court, HARRIS, J. The agreement between the Delaware and Hudson Canal Company and the plaintiff can scarcely be considered as amounting even to a conditional sale

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of the boat. The plaintiff, it is true, was to take *charge of, and navigate* it during the season, but he was to do so, in conformity with the orders and directions of the company, and in every respect, was to act as their servant. They reserved the right to discharge him from their employment at pleasure, and to resume the absolute possession of the boat; and in that case, they were not even to be accountable for the \$8 per trip, retained under the agreement. At the most, there was but a contract for a future sale, in case the plaintiff should continue to run the boat long enough to pay the price stipulated in the agreement.

I was at first inclined to think that even under such an agreement, the plaintiff having the boat in his possession, at the time it was seized by the defendant, and the company having retained out of the plaintiff's earnings in running the boat in their employ, towards the purchase of the boat, \$136, and not having elected to terminate the agreement, he had such a special property in the boat as would sustain the action. But upon reflection, I am convinced that this position can not be maintained. To bring the case within the principle of those cases in which the action has been maintained by virtue of a special property, even against the general owner, the plaintiff should have an absolute vested interest in the boat. But, by the contract, the complete and absolute ownership remained in the company. To maintain this form of action, the plaintiff must show at the time of the conversion a right of property, special or general, in himself. This the plaintiff can not do. It is inconsistent with the express provisions of the agreement under which the plaintiff received the possession of the boat. His possession was that of a mere servant, restricted to use the boat for the company, and in the manner prescribed by them. Such possession, like that of the master of any other boat owned by the company, was the possession of the company. The terms of the agreement are such as to exclude the idea that it was intended that the plaintiff should have a lien upon the boat for the amount retained by the company before the entire price was paid.

This precise question has recently been before the supreme

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court of Pennsylvania, in the case of *The Farmers' Bank of Bucks County v. McKee*, (2 Barr, 318.) That was an action of trover for seven canal boats, sold by the sheriff as the property of the Sugar Loaf Coal Company, and purchased by an agent of the bank. An agreement between the company and McKee was proved, by which the former agreed to employ the latter to boat coal during the season of 1841, at certain rates; and it was agreed "that \$10 of the freight money of each trip should be retained by the company, and when that amount should equal the cost of the boats, which was \$375 each, with interest, then they should be transferred to him." It appeared upon the trial that the company had credited McKee, for freight money retained under the agreement, about \$1000. The judge who presided at the trial, held that the price of the boats not having been fully paid, the creditors of the company had a right to levy upon and sell their interest, to which the purchaser succeeded, and that the purchase by the bank, and its refusal to recognize any title in McKee, was evidence of conversion, and that he was entitled to recover to the extent of his payments on the boats. But the court held, upon error, that the judge erred in charging the jury that the plaintiff could recover to the extent of his payments, in pursuance of his contract. They say "the action was trover and conversion, and in that action it is essential for the plaintiff to show that the right of property was in him, at the commencement of the action; and if he had not then paid up the whole purchase money, he had no right of property in the boats, nor was the company bound to transfer them to him. His remedy, if he had any, would be against the Sugar Loaf Company, for failure on their contract."

A similar question arose before the same court, in the case of *The Lehigh Company v. Field*, (8 Watts & Serg. 232.) There the boat had been levied upon as the property of the boatman. It was held that he was merely the servant of the company, until the boat was paid for; that the agreement was only executory, and the property remained in the company until the price was fully paid. (See also *Strong v. Taylor*, 2 Hill, 326.)

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There is nothing in the point made by the plaintiff, that there was no evidence that the collector had demanded payment of the tax, before he made his levy. It does not lie with the plaintiff to make this objection; and besides, no rule is better settled, or rests upon more obvious good sense, than that a public officer shall not be required to prove that he has performed the duty which the law imposes upon him, until at least some evidence appears to the contrary. (*Dowing v. Ruger*, 21 Wend. 178. *Barhydt v. Valk*, 12 Id. 145.)

I am of opinion, therefore, that the decision at the trial was right, and that the motion to set aside the nonsuit should be denied.

Motion denied.

SAME TERM. *Before the same Justices.*

THE PEOPLE, *ex rel.* Davenport, vs. KLING.

As against the mother of a bastard child, the putative father has no legal right to its custody. The mother, as its natural guardian, is bound to maintain it, and is entitled to the control of it.

The office of a writ of *habeas corpus* is to inquire into the ground upon which any person is restrained of his liberty, and, when it is found that the restraint is illegal, to deliver him therefrom.

In the case of a child too young to be capable of determining for itself, the court or officer assumes to determine for it, and in doing so, the welfare of the child is chiefly, if not exclusively, to be had in view.

Upon *habeas corpus* to determine as to the custody of an infant, all the court is bound to do, *ex debito justitiae*, is to set the infant free from improper restraint. Whether it will deliver it over to any body is left to its discretion.

And whether the court, or officer, exercises that discretion wisely, or not, is a question which can not be reviewed upon certiorari.

CERTIORARI, to remove proceedings before the county judge of Schoharie, upon a writ of *habeas corpus*, into this court. The relator was the mother of a bastard child, named Martin

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Kling, born in November, 1844. The defendant was the putative father of the child. In October, 1847, the relator presented a petition to the Hon. Demosthenes Lawyer, county judge of Schoharie, stating that on the 2d day of that month, the defendant had illegally and forcibly taken the child from her custody, and carried it away, and that he still illegally detained the child. A writ of habeas corpus was thereupon allowed, commanding the defendant to bring the child before the judge, &c. The defendant, among other things, returned to the writ that the relator was in very indigent circumstances; that she was of weak and imbecile mind, and was not a proper or fit person to have the care and custody of the child; that, while with her, the child had suffered greatly for the want of proper and sufficient food and clothing; that at the time mentioned in the petition for the writ, he had applied to the relator for leave to take and bring up the child; that, no objection or opposition having been made by her, he took the child and delivered him to his father, Henry Kling, who took the child into his family and adopted him as his own child. Witnesses were examined, and after hearing the parties the judge dismissed the habeas corpus. The relator obtained a certiorari, removing the proceedings into this court.

Thomas Smith, for the relator.

C. G. Clark, for the defendant.

By the Court, HARRIS, J. Were this a controversy between the mother of the child and the putative father, as to which had the better right to the custody and guardianship of the child, as the relator's counsel seems to have supposed it to be, there could be no doubt that the decision of the county judge was erroneous. As against the mother of a bastard child, the putative father has no legal right to its custody. The mother, as its natural guardian, is bound to maintain it, and is entitled to the control of it. It is only by provision of statute, and the inter-

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vention of public officers, that the father can be compelled to support it. (3 *Kent's Com.* 5th ed. 216.)

But the difficulty with the relator's case is, that this is not a question to be determined upon habeas corpus. This writ is, by eminence, *the writ of liberty*. Its office is, to inquire into the ground upon which any person is restrained of his liberty, and, when it is found that the restraint is illegal, to deliver him from such illegal restraint. Ordinarily, this end is attained by allowing the party improperly detained the free exercise of his volition. But in the case of a child, too young to be capable of determining for itself, the court or officer assumes to determine for it. In making such election for the child, its welfare is chiefly, if not exclusively, to be had in view. The rights of parental authority are to be regarded no farther than they are consistent with the best good of the child. The tribunal before which it is brought, is to do what it may suppose the child, in the exercise of a proper judgment, and looking to its own benefit, would do. In the *matter of the McDowells*, (8 *John*, 328,) it was held, upon the authority of Lord Mansfield in *Rex v. Delaval*, (3 *Burr.* 1434,) that, upon habeas corpus all the court was bound to do, *ex debito justitiæ*, was to set the infant free from improper restraint; that whether it would *deliver it over* to any body, must be left to *its discretion*. In that case two boys, one *eleven*, the other *eight* years old, were brought before the court upon writs of habeas corpus, issued upon the application of the father, to members of the society of Shakers, with whom the children were living. The court said all they were required to do upon that writ, was to declare that the infants were at liberty to go where they pleased, and upon being satisfied that they desired to return to the Shakers, an officer was directed to protect them in their return. So in the *matter of Waldron*, (13 *Wend.* 418,) the court, being satisfied that it would be more for the benefit of the infant to remain with its grandfather, to whom the habeas corpus had been issued, refused to direct it to be delivered to its father. The court said it was a matter resting in the sound discretion of the court, and not a matter of right which the father could claim at their

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hands. The same principle is recognized by Justice Bronson in *Mercein v. The People*, (25 Wend. 73.)

I admit that this discretion is not to be arbitrarily exercised. Nor are the rights of the parent to be wholly disregarded. While the court is bound to give such direction, in relation to the custody of the child, as in its conscience it believes will be most for its interest; it is also bound, I think, other things being equal, to prefer the claim of the parent, as against third persons, and the father as against the mother. In this case, although a matter addressed to the discretion of the judge, if it had appeared that the relator had possessed the capacity and means of maintaining and educating the child as well as its grandfather, who had received it into his family, I think a judicious exercise of his power would have required the judge to deliver the child into the custody of its mother. But such a state of facts was not presented. No one, upon the evidence as it appeared before the judge, could hesitate to believe that the child, if capable of deciding for itself, would have preferred to remain where it was, rather than return to its mother. If it remained, it had the prospect of a home, and a comfortable support. If it returned, it would have little else to expect, but a precarious living for the present, and ignorance, and idleness, perhaps degradation and vice for the future. I am, therefore, entirely satisfied with the determination of the county judge to leave the child with its grandfather

But whether the judge exercised his discretion wisely or not, is a question which does not admit of review. Even though he may have been guilty of a flagrant abuse of his discretion, yet so far as his decision rested in mere discretion, this court has no right to interfere. No rule is now better settled than that error is not predicable of any matter resting in mere discretion. It is true the statute authorizes the removal of all proceedings, commenced under the article relating to writs of habeas corpus, *by certiorari*, into the supreme court, "there to be examined and corrected." But the review here provided, like all other cases of review upon error, must be confined to matters of law. If there has been no error in law, the proceedings can not be

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"corrected," however improperly the tribunal below may have exercised its power. (*United States v. Wyngall*, 5 *Hill*, 16.) Although the chancellor, in the oral opinion delivered by him in the case of *Mercein v. The People*, (25 *Wend.* 97,) is reported to have used language from which it might be inferred that it was his opinion that the statute had conferred upon this court the power of reviewing and correcting all decisions of the inferior tribunal, under the habeas corpus act, yet there is nothing in what that learned jurist is reported to have said on that occasion, from which it is necessarily to be understood that such was his understanding of the statute. I agree with him that the certiorari which the statute gives for the removal of the proceedings, is not a mere common law certiorari, limiting the court, in its review, to the single question of jurisdiction; and farther, that the statute contemplates a review upon the merits, when the proceedings have been removed, so far as the legal rights of the parties are involved, and if any error has happened in respect to such legal rights, that they should be "corrected" by the court of review. Beyond that I do not think the chancellor himself intended to go. But in any view that may be taken of this case I think the proceedings of the county judge should be affirmed.

Proceedings affirmed.

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ONTARIO GENERAL TERM, May, 1849. *Maynard, Welles,*
and Johnson, Justices.

GILLETT and others vs. BALCOM.

A mortgage upon real estate binds not only the land, but the crops thereon, while growing, and until they are severed therefrom.

And a person purchasing the mortgaged premises at a sale under a statute foreclosure of the mortgage is entitled to the crops growing thereon, in preference to a person bidding the same off at a sale subsequently made, under a decree in bankruptcy against the mortgagor, by the assignee in bankruptcy.

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Where a debt, secured by a mortgage, is payable on demand, it is due immediately, and the mortgagee has a right to foreclose at any time; without making any previous demand.

The commencement of a suit upon the bond, or of proceedings in chancery or under the statute, to foreclose the mortgage, is, in such a case, a sufficient demand.

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TROVER for a quantity of wheat, tried at the Steuben circuit in November, 1846, before H. GRAY, circuit judge. On the trial the following facts appeared: On the 24th of December, 1842, Uri Balcom presented his petition in bankruptcy to the district court of the United States for the northern district of New-York, accompanied by the usual schedules, and on the 9th of February following, was duly declared a bankrupt. The wheat in question was then growing on the premises of the bankrupt and was owned by him. The assignee in bankruptcy sold the wheat, which was bid off and purchased by the plaintiffs at such sale, in April or May, 1843. The defendant afterwards harvested the wheat, and took and converted the same to his own use. It also appeared that on the 10th of September, 1842, the said Uri Balcom mortgaged to the defendant certain premises, including the land on which the wheat in question grew, to secure the sum of 1600 dollars payable *on demand*. The mortgage contained the usual power of sale in case of default of payment. Also a regular foreclosure of this mortgage by advertisement and sale under the statute, at which sale the defendant became the purchaser of the mortgaged premises for the sum of \$500. The sale under the foreclosure took place on the 29th day of April, 1843. The mortgagor gave up possession of the mortgaged premises to the defendant, between the 1st and 10th of April, 1843, and before the sale of the wheat by the assignee in bankruptcy. There was no proof that payment of the money secured by the mortgage had been demanded of the mortgagor before the foreclosure, or at any other time; and the plaintiffs' counsel contended, at the trial, that the money was not due until demanded, and that therefore the mortgage had not become forfeited, and the foreclosure was invalid and ineffectual. He also contended that the mortgage was not due

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and had not become forfeited at the time the wheat was sown, and therefore the wheat, at the time, belonged to Uri Balcom, and that the plaintiffs had acquired his right to it. The circuit judge nonsuited the plaintiffs, who excepted to his decision, and now moved to set aside the nonsuit, and for a new trial.

W. Barnes, for plaintiffs.

E. Howell, for defendant.

By the Court, WELLES, J. Under the decree, declaring Uri Balcom a bankrupt, which bears date Feb. 9, 1843, and the 3d section of the bankrupt act of August 19, 1841, the title to the wheat in question, as well as to the land on which it was growing, vested in the assignee in bankruptcy. Such title, however, came to the assignee charged with the incumbrance of the mortgage to the defendant, which held, not only the land, but the crops thereon, while growing, and until they were severed therefrom. (*Shepard v. Philbrick*, 2 Denio, 174, and authorities there cited.)

The mortgage was regularly foreclosed under the statute, and the mortgaged premises sold under the foreclosure to the defendant, before the sale by the assignee in bankruptcy, and the mortgagor, before the sale by the assignee to the plaintiffs, surrendered possession to the defendant. The plaintiffs' counsel, however, insists that as the money, to secure the payment of which the mortgage was given, was payable on demand, and that as no demand was proved, the money was not due, and the mortgage not forfeited, and that therefore the foreclosure was of no avail to vest the title in the defendant.

It has been long settled, that where a note is payable on demand, no other demand need be made except by bringing a suit thereon. (*Story on Prom. Notes*, § 29, and authorities there cited. 3 Wend. 21, per Savage, Ch. J.) The rule is founded upon the assumption that the debt, in such a case, is due, generally, as soon as the note is given, and that by the contract between the parties, a demand is not made a condition to the

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maker's liability; and that the commencement of the suit is a sufficient demand in a case where a party has agreed to pay his own debt on demand.

I am not able to discover why the same rule should not apply to a debt secured by a mortgage, payable on demand. In this case the debt was due generally, and the mortgagee had the right to foreclose at any time. The foreclosure under the statute was, in my opinion, equivalent, as far as this point is concerned, to a suit on the bond, or to a foreclosure in chancery.

In *Nelson v. Bostwick*, (5 *Hill*, 39,) Bronson, J. says, "Where a party agrees to pay his own debt on request, it is regarded as an undertaking to pay generally, and no special request need be alledged. But it is otherwise where he undertakes, for collateral matter or as surety for a third person. There, if the agreement be that he will pay on request, the request is parcel of the contract, and must be specially alledged and proved."

The rule would probably be the same in a case where the debt was payable in property, or otherwise than in money, upon request or on demand; and would require the plaintiff to aver and prove the request or demand.

My opinion is that the nonsuit was proper and should not be set aside.

Motion denied.

SAME TERM. *Before the same Justices.*

SCHUTT vs. LARGE.

The surrender or cancelling of a deed, after delivery, will not reinvest the grantor with the title to the land conveyed.

A person whose title to land, though regular, on paper, is obnoxious to the objection of having been obtained by fraud, can not shield his title by conveying the premises to a *bona fide* purchaser, and afterwards purchasing them back.
Per WELLES, J.

The recording acts protect none but innocent and *bona fide* purchasers and hold-

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ers of real estate. And none should be deemed *bona fide* purchasers who purchase with knowledge, or notice, of a defect in the title.

The recording of a deed is constructive notice to all the world, of its existence. There is no difference between the effect of such notice, on a question of superiority of title, and an actual notice, so far as respects the person receiving such actual notice.

The title of a *bona fide* purchaser of premises for a valuable consideration, claiming to hold the same under a regular chain of subsequent recorded conveyances, will, under the operation of the recording acts, be preferred to the title of a person claiming the premises under and by virtue of a prior unrecorded conveyance from the same common source of title.

But in an action of ejectment against such subsequent purchaser, the questions of notice to him of the prior unrecorded deed, and of *good faith*, on his part, in making the purchase, are material questions, and should be submitted to the jury.

EJECTMENT for an undivided one third of seven acres and 46 rods of land in Manchester, Ontario county. The plaintiff claimed to recover as one of the heirs at law of Coonrod Schutt, his father. On the first day of November, 1834, one David Briggs and his wife conveyed to Coonrod Schutt by warranty deed, about 17 acres of land, including the premises in question. This deed was duly acknowledged, but was never recorded. Coonrod Schutt entered into possession of the premises described in the deed, and remained in possession until his death, in July, 1837. He left a widow, Dorothy Schutt, and three children, the plaintiff and two daughters. Contemporaneously with the execution of the deed from Briggs and wife to Coonrod Schutt, the latter, with his wife Dorothy, executed to Briggs a mortgage upon the 17 acres of land described in the deed, to secure the sum of \$363.39, being part of the purchase price of the land. The mortgage was duly acknowledged on the 3d of November, 1834, and recorded in the office of the clerk of Ontario county, September 1st, 1835. After the death of Coonrod Schutt, and in the fall of the year 1837, an arrangement was entered into between Briggs and Dorothy Schutt, the widow of Coonrod, to the effect that the latter should deliver up to Briggs the deed from him to Coonrod, which had remained in her possession since the death of her husband, to be cancelled; that Briggs should convey to Dorothy the seven acres in question, and

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should give up to her, and satisfy of record, the mortgage from Coonrod and wife for the \$363,39. This arrangement was carried into effect, and Briggs and wife, on the 17th of November, 1837, conveyed to Dorothy Schutt the seven acres in question, and the mortgage was satisfied of record, and the deed from Briggs and wife to Coonrod Schutt was delivered up by Dorothy to Briggs, to be cancelled. The remaining ten acres were afterwards sold and conveyed by Briggs to one Hardin. There was, at the time of this arrangement, about \$300 unpaid of the mortgage debt, which was all due at the time of the death of Coonrod Schutt. This amount was secured to Briggs by Hardin, by a mortgage upon the ten acres sold to him by Briggs, and upon other lands. There was no other consideration for the satisfaction of the mortgage than the delivering up by Dorothy to Briggs of the deed from Briggs to her husband, to be cancelled. The defendant was in possession of the premises described in the declaration, at the time of the trial, and had been for two or three years. The case stated—"It was admitted on the part of the plaintiff, that the defendant was a *bona fide* purchaser of the premises in question, in good faith."

After the plaintiff had rested, the defendant gave in evidence, the above mentioned deed from Briggs and wife to Dorothy Schutt, dated 17th of November, 1837, which was duly acknowledged and recorded February 6, 1841. Also a warranty deed from Dorothy Schutt to Martin Schutt, dated 19th of April, 1841, for the premises described in the declaration, which was duly acknowledged, and was recorded April 24, 1841. Also, a warranty deed from Martin Schutt to Dorothy Schutt, for the same premises, dated 11th of January, 1843, duly acknowledged, and which was recorded 19th of September, 1843. Also, a warranty deed from Dorothy Schutt to Belinda Jane Peer, wife of Richard Peer, dated 18th of December, 1843, duly acknowledged the same day, and recorded 19th of December, 1843, for the same premises. Also, a deed of quit-claim, from Richard Peer and Belinda, his wife, to the defendant, dated 11th of April, 1844, acknowledged the same day, and recorded 4th of March, 1844, consideration \$400, for the same premises. The defend-

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ant went into possession of the premises in question, under the last mentioned deed. Mrs. Peer was a daughter of Coonrod Schutt. Evidence was given on the subject of the defendant's knowledge of the arrangement between Briggs and Dorothy Schutt, above detailed, before he purchased the premises of Peer and wife.

The cause was tried at the Ontario circuit, before Whiting, circuit judge, and the jury, under the charge of his honor, found a verdict for the plaintiff. The defendant now moved for a new trial.

T. R. Strong, for the defendant. I. The giving up of the deed of Briggs and wife, under the circumstances of the case, reinvested Briggs with the title to the premises in question, which, by the several conveyances introduced in evidence, passed to the defendant, who was therefore entitled to a verdict. (2 *John.* 84. 6 *Hill*, 469, *contra.*) II. If the giving up of the deed of Briggs and wife to Briggs did not invest Briggs with the title to the premises, the mortgage of Coonrod Schutt and wife to Briggs remained in force, and all interest in and claim to the premises under the same passed by the conveyances of Briggs and the subsequent grantees, given in evidence, to the defendant, who, having the mortgage interest, and being in possession, could not be dispossessed by ejectment. (2 *John.* 84. *Approved* 6 *Hill*, 469, *as to the right of a mortgagee in possession.* 7 *Cowen*, 13. 15 *Wend.* 248.) That the mortgage is in force as between the parties, see further, 5 *Wend.* 597; 1 *Hill*, 532. III. The deed from David Briggs and wife to Coonrod Schutt not having been recorded, if the defendant had not notice of it when he purchased, he would not, under the circumstances of the case, be affected by it, and under the operation of the recording acts, he was entitled to priority over any one claiming under that deed. (1 *R. S.* 746, 2d ed. *Id.* 756, 1st ed.) IV. If either of the grantors of the premises through whom the defendant claims purchased in good faith and for a valuable consideration, without notice of the deed from David Briggs and wife to Coonrod Schutt, although the defendant might have had

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notice of that deed when he purchased, he could not, under the circumstances of the case, be affected by it, and under the operations of the recording acts, was entitled to priority over the plaintiff. (7 *Cowen*, 360. 10 *John*. 186, 196.) V. The plaintiff claiming an undivided interest in the premises, and it appearing that the defendant had acquired the remaining interest in the premises, or some part thereof, the plaintiff could not recover without proof of an ouster by the defendant; which was not proven. (12 *Wend*. 494. 4 *Hill*, 116.)

A. *Worden*, for the plaintiff. I. Cornelius Schutt, the father of the plaintiff, died seised in fee of the premises in question, at which time the plaintiff was an infant, and his mother guardian in soccage; and as such, she was in possession, and could not, therefore, take a title and set it up against the title of the plaintiff, while the possession continued. II. The defendant took title and possession under the guardian in soccage, and such possession was that of the plaintiff, and the recording act has nothing to do with the case; because, when Dorothy Schutt took the deed from Briggs, she was in possession under, and in subservience to, the plaintiff's title. III. The defendant was bound to take notice of, and to know, the character of the possession he took from his grantor. He is chargeable with notice of the fact that Cornelius Schutt died seised leaving heirs, and that Dorothy Schutt continued in possession; and he is presumed to know the character of that possession, and that his grantor derived possession from her.

By the Court, WELLES, J. At the death of Coonrod Schutt, the title to the premises in question descended to his three children, of whom the plaintiff was one. Coonrod Schutt was seised, at the time of his death, by virtue of the deed to him from David Briggs and wife, as perfectly as if it had been recorded; and the cancelling of that deed, after his death, by his widow, did not reinvest Briggs with the title. If Coonrod Schutt, in his lifetime, had cancelled his unrecorded deed, with a view to revest Briggs with the title, and Briggs, at his request, had

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conveyed the land to a third person, perhaps Coonrod, and those claiming by title afterwards derived from him, would have been estopped from denying Briggs' right to convey. There are a few cases which seem to support such a view; but they can only be upheld upon the principle of estoppel *in pais*. Admitting that to be so, it does not interfere with the general rule, that a grantor can not be reinvested with the title by a destruction of his grant.

The plaintiff, however, is not estopped from denying title in Briggs at the time he undertook to convey the premises to Dorothy Schutt; nor from repudiating the arrangement between her and Briggs. He was an infant at that time; and it does not appear that he assented to, or knew of it. He was incapable, by reason of his non-age, of binding himself by any assent, even if he had given it.

It is claimed that if the giving up and cancelling the original deed by Coonrod Schutt's widow, did not revest the title in Briggs, the mortgage from Schutt and wife to him remained in force, and that the money secured by it, being due, the mortgage was forfeited, and Briggs was thereby vested with the title, and authorized to convey the land. This can not be so. The mortgage was only a security for the debt, and a lien upon the land for that purpose. The mortgagor is looked upon as the owner of the land, until foreclosure. Besides, Briggs did not assume to hold the land as mortgagee. On the contrary, he relied upon the cancellation of the deed, which he had given, as reinvesting him with the title, satisfied the mortgage of record, and took security from Hardin for the debt due upon it. He did not pretend any right, as mortgagee in possession, to convey the land. The transaction was one of an entirely different character. The objection that the plaintiff did not prove an ouster, can not prevail. The defendant purchased and claimed the entire premises, and was in possession of the whole, in hostility to the plaintiff. He relied upon a title which utterly excluded the plaintiff, and amounted to a total denial of his right as a co-tenant. (2 R. S. 306, 7, § 27.)

The more important question remains to be examined; and

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that is, whether, under the operation of the recording acts, the defendant's title is not superior to that of the plaintiff. The deed from Briggs to Dorothy Schutt was duly recorded, as were all the subsequent deeds, down to the defendant. When the defendant purchased, he found his grantors in possession under a regularly recorded title from Briggs, through whom the plaintiff claims title. The statutes on this subject are as follows: "Every conveyance of real estate, within this state, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded. (1 R. S. 756, § 1.) "Every grant shall also be conclusive as against subsequent purchasers from such grantor or from his heirs, claiming as such, except a subsequent purchaser in good faith and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first duly recorded." (*Ib.* 739, § 144.) These sections, although passed at different times, took effect at the same time. They are *in pari materia*, and must be construed with reference to each other.

The question is, who or what class of subsequent purchasers are protected? In *Raynor v. Wilson*, (6 Hill, 473,) I understand Beardsley, justice, to hold that none are protected but successive purchasers from the same grantor. That a conveyance will not be void, under the statutes, by reason of not being recorded, as against a subsequent purchaser, unless the subsequent conveyance is from the same grantor as in the first or unrecorded conveyance. If this construction is to prevail, much less security than has been generally supposed, is given to purchasers by examinations of titles in the offices of county clerks. In this case, the defendant procured the recorded title to be examined by the clerk of Ontario county, (in which county the land was situated,) whose certificate presented a regular deduction of title from Briggs to Mrs Peer, who joined with her husband in conveying the premises in question to the defendant. In the

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case referred to, it was not necessary to maintain the doctrine, which it is supposed to assert, in order to produce the same result or decision of the case. It was shortly this: On the 5th of October, 1841, one Penny, who then owned the premises, conveyed them to the plaintiff, but the deed was never recorded. In September, 1842, the plaintiff sold the premises to the defendant, and instead of conveying them himself, he redelivered the deed to Penny which he had received from him, which was thereupon destroyed, and Penny executed a deed of the premises to the defendant's wife, which was duly recorded. The plaintiff recovered at the circuit, and a motion for a new trial was denied, on the ground that the recording acts did not apply to the case, and that the defendant could not be regarded as a *bona fide* purchaser, as he had full knowledge of the deed from Penny to the plaintiff, at the time of his purchase of the premises. It was simply a question of superiority of title between the parties, both claiming under deeds from Penny; that to the defendant's wife being duly recorded, and the deed to the plaintiff not only not having been recorded, but it had been redelivered to the grantor and destroyed. But the whole transaction, and all the circumstances, were known to the plaintiff, and therefore the question of priority of record, or whether the plaintiff's deed had been recorded at all, became entirely immaterial.

In the present case, Dorothy Schutt was not a *bona fide* purchaser of Briggs. She knew that he had conveyed the premises to her husband, and that the latter had died seised of them. Her conveyance to Martin Schutt, and his conveyance back to her, did not make her title any better, even admitting Martin Schutt to have been a *bona fide* purchaser. She was a party to the transaction with Briggs, which was a fraud upon the heirs of her late husband; and it seems to me that it will not do to allow a person, whose title, though regular on paper, is nevertheless obnoxious to objections of this character, to shield his title, by conveying the premises to a *bona fide* purchaser, and afterwards purchasing them back. It would be leaving a door open through which great frauds might be perpetrated.

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The chain of title is broken, or rather does not proceed from, or connect with, the true source. None should be deemed *bona fide* holders who purchase with knowledge or notice of the defect in the title.

But it is insisted that the defendant is a *bona fide* purchaser for a valuable consideration, and is protected under the recording laws; and further, that Peer and wife, from whom the defendant received his conveyance, being *bona fide* purchasers from Dorothy Schutt, the title by that conveyance passed to the defendant discharged from the taint which attached to it in the hands of Dorothy, whatever may have been the knowledge which the defendant had of the transactions relating to the title of Dorothy. That after the title once becomes purified by force of the recording laws, it must remain unaffected by any previous contamination, notwithstanding it may afterwards pass into a person chargeable with notice, or even connected with the fraud. I can not subscribe to this last position. The statute protects none but innocent and *bona fide* purchasers and holders. If the defendant knew, or had notice of, the state of the title, or rather, of the defect of title in Dorothy Schutt, before he purchased, he is not to be regarded in the light of a *bona fide* purchaser, although nothing appears in the case to bring home to Peer and wife any knowledge of such defect.

As soon as the defendant received notice of the conveyance from Briggs to Coonrod Schutt, it was the same to him as if that conveyance had been then recorded. It is impossible, I think, to distinguish this case, in this aspect, from *Van Rensselaer et al. v. Clark*, (17 Wend. 25.) In that case, Derick Schuyler owned the premises in question on the 25th of August, 1794. On that day he conveyed them to James Van Rensselaer, the plaintiff's father, but the deed was not recorded until January 2d, 1804. On the 2d of July, 1799, Derick Schuyler conveyed the same premises to Philip H. Schuyler, whose deed was recorded October 25th, 1802. On the 2d of April, 1805, Philip H. Schuyler conveyed to Samuel Clark, who, in 1806, conveyed to James Emott, and Emott, in 1833, conveyed to Matthias Miller. The defendant was in possession at the commence-

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ment of the suit, as tenant to Miller. Philip H. Schuyler, at the time of the conveyance to him, had actual notice of the deed, at that time unrecorded, from his grantor Derick Schuyler, to James Van Rensselaer. The court held that Philip H. Schuyler, by reason of the notice, was not a *bona fide* purchaser; and that as the deed to James Van Rensselaer was recorded before the one from Philip H. Schuyler to Clark was given, the latter took the land chargeable with notice of the deed from Derick Schuyler to James Van Rensselaer, the plaintiff's ancestor. It was not claimed that either Clark, Emott, or Miller, had actual notice or knew of the deed from Derick Schuyler to James Van Rensselaer. Upon examinations of the clerk's office, they found a regular recorded title in their respective grantors. It is true, that the records informed them that Derick Schuyler had conveyed the premises to Van Rensselaer previously to the conveyance to Philip Schuyler, but the same evidence proved that the deed to the latter was first recorded, and the statute declared the first deed in such case void, unless for matter *in pais*, of which they were entirely ignorant. The recording of a deed is constructive notice to all the world of its existence. There is no difference between the effect of such notice on a question of superiority of title, and an actual notice, as far as respects the person receiving such actual notice.

It was argued in the case last referred to, that Clark bought of Schuyler on the faith of finding that *his deed* was first recorded, and that he should not be held to look farther and run the hazard of actual notice to Schuyler. But it was held otherwise, by the court; and they decided that to entitle a purchaser to protection under the recording acts, he must be a *bona fide* purchaser in the strict sense of the term. He must not have notice when he buys, as notice is inconsistent with *bona fides*. (*Jackson v. Post*, 15. *Wend.* 588. *Tuttle v. Jackson*. 6 *Id.* 226.)

In the present case, if the defendant was a *bona fide* purchaser for valuable consideration, I think he should be protected. The case states that it was admitted on the trial, on the part of the plaintiff, that the defendant was a *bona fide* purchaser in good faith; and the defendant offered to prove that he paid the

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sum of \$400 for the premises in question, that being the consideration mentioned in the deed to him; which evidence was excluded, on the ground that it was unnecessary to prove the consideration. Notwithstanding this admission, proof was given by the plaintiff, tending strongly to show, that at the time the defendant received the deed from Peer and wife, he was informed of the transactions between Briggs and Mrs. Schutt, after the death of her husband, in relation to the titles, sufficient probably, if the jury believed the witnesses, to put him upon inquiry; which is enough, in such cases, to take away the plea of good faith.

But this question was withdrawn by the circuit judge entirely from the jury, who were instructed that if they were satisfied that the defendant was in possession at the commencement of the suit, the plaintiff was entitled to recover. The question of notice to the defendant of the deed to Coonrod Schutt, and the manner in which his widow attempted and claimed to have acquired the title, was one peculiarly within the province of the jury to decide. The judge decided it was an immaterial question; whereas it was the main, and I think the most material, one for the jury in the case.

A new trial is granted, with costs to abide the event.

SAME TERM. *Maynard, Welles, and Selden*, Justices.

ALLEN vs. BODINE.

The right of counsel, cross-examining a witness, to inquire into collateral facts, with a view to discredit the witness, is in the discretion of the court; and the question is to be decided by the judge upon all the circumstances appearing before him.

The decision of the judge at the circuit, upon that question, is conclusive, and can not be the foundation of an application for a new trial; except in a clear case of abuse of the judge's discretion.

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MOTION by the defendant for a new trial. The action was assumpsit, tried at the Cayuga circuit in February, 1846. The action was brought to recover the amount of a promissory note made by the defendant and one William Smith, payable to Silas Beardsley or bearer, for five hundred dollars, six months after date, with interest, and dated November 30, 1838. Smith had been discharged from his debts under the United States bankrupt law. The defence set up was usury. It was claimed on the part of the defendant that the note in question was given to secure a loan made by the payee to the maker Smith, and that as a condition of the loan, Smith was to pay, and did pay, to the payee, \$25 beyond the legal rate of interest. On the trial Smith was sworn as a witness for the defendant, and testified to the usurious contract. On the part of the plaintiff, Beardsley, the payee, was introduced and sworn as a witness, and denied the usury. He was corroborated in his statements, to some extent, by his daughter Sally Ann Beardsley, another witness for the plaintiff, who it appeared was present during most of the negotiation for the loan. The testimony of the witness Smith was clear and positive, and was corroborated by statements which he testified were made, at the time of the transaction, in his cash book. That of Beardsley was less positive in detail. He evidently testified with much caution. It appeared from his evidence, that at the time the note in question was given, he paid Smith about half of the amount, being all the money he had by him at the time, and gave his notes for the remainder, payable in a short time. In his testimony he said, "There was no agreement or understanding that I was to have more than seven per cent; that he did not pay me back any money at that time, to my recollection; the money I paid him and my note made \$500. I paid him the whole of that note and the interest. After I paid Smith the money on that note, he said I had been to trouble in getting the money for him, and he would some time make me a present of \$25. I think there was no agreement at the time. I believe I did not make any exaction of him. I think I should have remembered it, if it had been so. He did not pay me back money at that

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time, to my recollection. I should suppose I should recollect it, if he had." The counsel for the defendant asked the witness if Smith had been in the habit of making him presents on other loans before that? The plaintiff's counsel objected to the question, and the circuit judge sustained the objection.

After the evidence was closed, the circuit judge charged the jury by first explaining to them what constituted a usurious agreement; and after recapitulating to them the testimony on both sides, stated that there was in the case the conflicting evidence of Smith on the one side and Beardsley and his daughter on the other side, as to the usurious agreement, and the paying of the money back. That it was the exclusive province of the jury to judge of the testimony, and give it that weight it merited; and if, in their judgment, the preponderance of the testimony was in favor of the plaintiff, they would find for him for the amount which appeared to be due on the notes. On the contrary, if they thought the preponderance of the testimony was in favor of the defendant, and established the defense of usury, they would find for the defendant.

The jury returned a verdict in favor of the plaintiff for \$736,71.

A. Bascom for the defendant.

D. Andrus, for the plaintiff.

By the Court, WELLES, J. I think the questions of fact were all fairly submitted to the jury. Whatever criticism the evidence of the witness Beardsley may be liable to, he was corroborated by his daughter, so far as her evidence went. It was exclusively a question for the jury; and I am not able to discover any misdirection. The only question that deserves serious consideration is whether the judge properly overruled the question put to Beardsley by the defendant's counsel, whether Smith had been in the habit of making him presents on previous loans. The only point of view in which that question could be regarded as material was by way of testing the witness on cross-examination. It certainly was entirely immaterial upon the issue, what had been done on previous loans, not connected

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with the one which was then the subject of inquiry. If the question had been allowed to be answered, the defendant would not have been permitted to contradict the answer; as it related to a fact entirely collateral.

I have supposed that the right of the cross-examining counsel, to inquire into collateral facts with a view to discredit the witness, was always in the discretion of the court; and that the decision of the judge at the circuit was conclusive, and not to be the foundation of an application for a new trial, except in a clear case of abuse of that discretion. (1 *Greenl. Ev.* § 448, 449.)

Great latitude is sometimes permitted, where from the temper and conduct of the witness, or other circumstances, such course seems essential to the discovery of truth. It is nearly impossible to lay down a rule on this subject; as the question is always a matter of discretion with the judge, to be decided by him upon all the circumstances appearing before him. In the present case I can not discover such an abuse of discretion in disposing of the question by the circuit judge, as to warrant the interposition of this court.

I think a new trial should be refused.

Motion denied.

NEW-YORK GENERAL TERM, May, 1849. *Jones, Edmonds,*
and Edwards, Justices.

McCULLOUGH and others vs. COX and others.

By a lease dated the 4th of March, the plaintiffs demised to the defendants, a house and store for one year from the first of May then next; the store to be fitted up at the expense of the plaintiffs, and completed and ready for occupancy by the said 1st day of May, and the Croton water to be introduced into the house and store at the plaintiffs' expense; but no rent was to be charged for the store previous to the 1st of May. By a counterpart of the lease the store was to be fitted up by the owners for a genteel grocery, and to be ready for oc-

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cupancy by the 1st of April, and the house was to be completed by the 1st of May. In an action of covenant for the rent; *Held* that the covenants on the part of the lessors, contained in the instruments, were not conditions precedent.

Where mutual covenants go to the *whole* consideration, on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part* of the consideration, then a remedy lies on the covenant, to recover damages for a breach of it, but it is not a condition precedent.

In an action of covenant, for rent, the defendant can not, by a plea in bar, *recoupe* his damage for breaches of covenant by the lessor.

The meaning of *recoupment* is, a reduction of the damages claimed. It is merely a partial defence, and not a complete bar. Nor can it be made a bar by an allegation that the damages which the defendant claims by way of *recoupment* exceed those claimed by the plaintiff.

Where a defense is a complete bar, it must be pleaded, but where it only goes in mitigation, notice must be given. *Per EDMONDS, J.*

ERROR to the New-York common pleas. The plaintiff declared in covenant for rent accrued under the following instrument, executed by the defendants, and dated March 4, 1845: "This is to certify that we have hired and taken, from William McCullough and Hiland B. Weeks, the house and store at the corner of Fourth Avenue and Twenty-fifth-street. The store to be fitted up at the expense of the owners, for a genteel grocery, and to be ready for occupancy, by the first of April next, and the house to be completed by the first of May. The Croton water is to be introduced at the expense of the owners, in the house and store for one year, to commence the first day of May, 1845, at the yearly rent of four hundred and fifty dollars, payable quarterly. No rent is to be paid for the use of the store, previous to the first of May. We retain the privilege of renting this property for two years in addition, at five hundred dollars a year, and we do hereby promise to make punctual payment of the rent in manner aforesaid, and quit and surrender the premises at the expiration of the term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." The defendants pleaded; 1st. *Non est factum*. 2d. That at the time of executing the above writing by them, the plaintiffs made and executed a counterpart thereof, which was a part and portion of the instrument declared on, wherein the plaintiffs covenanted and agreed with

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the defendants that the said store was to be fitted up at their, the plaintiffs', expense, and to be completed and ready for occupancy by the first of April then next, and the house was to be completed by the first of May then next, and that the Croton water was to be introduced into the said house and store, at the plaintiffs' expense. And the defendants averred that at the time of executing the said lease and the counterpart thereof, the store was unfinished, incomplete, and unfitted for use and occupation as a genteel grocery, and so remained and continued until long after the said first day of April then next; and that the house was unfinished and unfit for occupancy at that time, and so remained and continued until long after the said first day of May then next; that the defendants had often requested the plaintiffs to fit up, at their expense, and to make ready for occupation the said store and house, and to introduce the Croton water therein, at their expense, but that they had neglected and refused to do so. And the defendants averred that the said covenants, stipulations and agreements were and are conditions precedent on the part of the plaintiffs, and that by means of the said several premises and breaches the defendants had sustained damage to a large amount, and to an amount exceeding the rent demanded by the plaintiffs; concluding with a verification and prayer of judgment. The counterpart of the lease or instrument set forth in the second plea, of which oyer was annexed to the plea, was executed by the plaintiffs, and was as follows: "This is to certify that we have this fourth day of March, 1845, let and rented unto William Cox & Sons, the house and store at the corner of Fourth Avenue and Twenty-fifth-street, the store is to be fitted up at our expense, and completed and ready for occupancy by the first of May next. The Croton water is to be introduced at our expense in the house and store, with the appurtenances and the sole and uninterrupted use and occupation thereof for the term of one year, to commence the first day of May, 1845, at the yearly rent of four hundred and fifty dollars, payable quarterly; no rent is to be charged for the use of the store previous to the first of May. The privilege of renting this property for two years in addition,

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at five hundred dollars, is hereby given to William Cox & Sons." The plaintiffs demurred to the second plea of the defendants, and assigned several causes of demurrer. The defendants joined in demurrer, and the court of common pleas held the plea to be good, and gave a judgment for the defendants.

D. Evans, for the plaintiffs in error.

L. S. Eddy, for the defendants in error.

EDWARDS, J. The declaration in this case, is in the usual form which has been adopted in actions of covenant broken, for the recovery of damages for the non-payment of rent; and it is not defective, either in substance or in form. If there was a condition precedent contained in the lease, which is not recited in the declaration, the defendants, if they wished to take advantage of such defect, should have cravedoyer of the lease, and demurred for a variance; or they should have objected to the introduction of the lease in evidence, under their plea of *non est factum*. (2 Saund. 366, n. 1. 1 Chit. Pl. 434.) The only question then, to be considered, is whether the special plea of the defendants is good.

The court below, in their opinion, and the defendants in the argument before us, seem to have been in some doubt, whether to consider it as a plea of a condition precedent, or of *recoupment*. If it is both, it is defective on the ground of duplicity, which is one of the causes of demurrer specially assigned. If it is either, it is bad on demurrer.

The plea alleges that there was a lease, and a counterpart, and professes to set forth the covenants contained in each, which are in some respects different. By the lease, the demised premises, consisting of a house and store, were let to the defendants on the 4th of March, 1845; the store to be fitted up at the expense of the plaintiffs, and completed and ready for occupancy by the first of May then next, the Croton water to be introduced into the house and store, at the plaintiffs' expense, for one year, to commence on said first of May; but no rent was to be

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charged for the store previous to the first of May. By the counterpart of the lease, the store was to be fitted up at the expense of the owners, for a genteel grocery, and to be ready for occupancy by the first of April, and the house was to be completed by the first of May. In other respects, the instruments were substantially the same.

The first question to be considered is, whether the covenants on the part of the plaintiffs, which are contained in these instruments, are conditions precedent. This must depend upon the intention of the parties, as it is to be collected from the instruments in which the covenants are contained. (*Porter v. Shephard*, 6 T. R. 668. *Glazebrook v. Woodrow*, 8 Id. 366, 371. *Retchie v. Atkinson*, 10 East, 295. *Havelock v. Geddes*, Id. 559.) There is also another rule of construction which has been adopted for the purpose of ascertaining whether covenants are conditions precedent or not, and that is, that where mutual covenants go to the *whole* consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part* of the consideration, then a remedy lies on the covenants, to recover damages for a breach of it, but it is not a condition precedent. (10 East, 295. 1 Chit. Pl. 323.)

Now, applying these rules to the case before us, are the covenants on the part of the plaintiffs conditions precedent? In the first place, it will be observed that there was an absolute letting of the premises on the fourth of March, and that the defendants had the right to take immediate possession under the lease. It also appears to have been the intention of the parties that the lessees should then take possession of at least, a part of the premises; for it was expressly stipulated that no rent should be paid for the use of the store, previous to the first of May. Now can it be said that acts which were to be done subsequent to the time of the commencement of the lease, and subsequent to the time when it seems to have been contemplated that the lessees should take possession of, and use the premises, shall be regarded as conditions precedent?

Again; the plaintiffs covenant, not that they will fit up the

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store, and complete the house, and introduce the Croton water, at the times specified, but that they will be liable for the expense thereof. But assuming that the plaintiffs were not only bound to pay the expense of fitting up the store, and completing the house, and introducing the Croton water, according to the terms of their covenants, but that the *legal effect* of their covenants is that they shall, themselves, do these acts, or cause them to be done, still the covenants, when taken in connection with what appears from other parts of the lease, do not go to the whole consideration. For the house may have been incomplete only in some particular part, and the store may not have been put in such a condition as to answer the undefined and somewhat indefinite description of a "genteel grocery," and the Croton water may not have been introduced, and yet the defendants may have had the full use and occupation of the house as a dwelling, and of the store as a grocery, and such their plea admits to have been the fact.

The next question to be considered is, whether the plea is good if it is to be regarded as a plea of *recoupment*, as it seems to have been intended, and as it was treated by the defendants' counsel on the argument. The meaning of *recoupment* is, a reduction of the damages claimed; and it is not in theory and contemplation of law, a complete bar. Neither can it be made so by an allegation that the damages which the defendants claim by way of *recoupment*, exceed those claimed by the plaintiffs.

In all the adjudicated cases, both in England and in this state, in which *recoupment* has been allowed, it has been considered, and has been generally described, as a *partial defence*. And, for this reason, it has been deemed necessary for the party claiming to recoupe to give notice to that effect; not as a substitute for a plea, according to the meaning of notices as allowed by the statutes of this state, but for the purpose of preventing surprise to the opposite party. In the case of *Barber v. Rose*, (5 Hill, 76,) which was relied on by the counsel for the defendants to sustain their plea, it was assumed by the court, that it was but a partial defence, and that it could not be pleaded.

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The conclusion is, that the declaration is not defective, but that the defendants' special plea is bad, and that the demurrer is well taken.

The judgment of the court below must be reversed.

EDMONDS, J. The contract was executed. The declaration avers that the defendants went into possession, and occupied the premises. Any breach, therefore, by the plaintiffs is not in bar, but only by way of recoupment. The subject matter is not wholly worthless, nor have the defendants returned the property. (*Van Epps v. Harrison*, 5 *Hill*, 65.) Where the defence is a complete bar, it must be pleaded, but where it only goes in mitigation, notice must be given. In this case, the defence is pleaded; and that can not be. 1. Because it is not in bar, as the covenant has been in part executed, and that part execution is not entirely worthless. 2. Because recoupment, which goes to part only, can not be pleaded. The demurrer ought to have been allowed, and the judgment must be reversed.

JONES, P. J. concurred.

Judgment reversed.

SAME TERM. *Before the same Justices.*

BOWNE vs. HYDE.

The maker of a promissory note, indorsed for his accommodation by another, is not a competent witness for such indorser, in a suit by the holder against him, unless released from costs and damages.

An attorney has no authority, as such, to release a witness in the name of his client.

MOTION for a new trial. The action was assumpsit, upon a promissory note made by David H. Dick, and indorsed for his accommodation, by the defendant. The defence was usury.

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The suit was tried before EDMONDS, Cir. Judge, in February, 1847. The making and indorsing of the note were admitted by the defendant's counsel. The plaintiff produced a notarial certificate of protest and notice to the defendant, and rested.

The defendant called as a witness David H. Dick, the maker of the note, to prove that the note was an accommodation note, indorsed as such by the defendant, for the witness, and made to be discounted by one Galen Hunter, who discounted the same for the witness, at a discount of \$10, and that the defendant never received any consideration for the note. The counsel for the plaintiff objected to Dick as a witness, on the ground of interest, and the objection was sustained by the court, and the defendant excepted. The counsel for the defendant then offered, in the absence of the defendant, who was not present in court, to execute a release to said David H. Dick, in the name and as the attorney of the defendant, which the court refused to receive, and set aside the witness for incompetency, on the ground of interest, to which decision of the court the defendant's counsel excepted. The defendant having no other witness present, the court charged the jury to find a verdict for the plaintiff, who returned a verdict for the plaintiff, for the amount of the note, and interest.

H. Ketchum, for the plaintiff.

E. Sandford, for the defendant.

By the Court, EDWARDS, J. The promissory note on which this suit was brought, was indorsed by the defendant for the accommodation of the maker. The circuit judge before whom the cause was tried, held that the maker was not a competent witness for the defendant, without a release.

Ever since the case of *Jones v. Brooke*, (4 Taunt. 464,) whenever the question has arisen, it has been held, or assumed as an existing rule, that the party for whose use an accommodation note has been drawn or indorsed, is incompetent as a witness for the party who has lent his name, and liability. This has

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recently been recognized by high authority in England, as the established rule of the common law. (*Lord Lyndhurst, in Burgess v. Cuthill*, 6 Carr. & P. 282.) The same rule was recognized in this state in *Hubbly v. Brown*, (16 John. 70,) and has since been adopted and followed. (1 *Greenl. Ev.* 401. 2 *Id.* 203, and authorities cited.) And whether founded upon good reasons or not, we consider it so far established by authority as to be controlling upon us.

The offer made by the defendant's counsel to execute a release in the name, and as the attorney of the defendant, was not sufficient. Neither would such a release, if it had actually been executed, have rendered the witness competent, as there was no offer to prove that the counsel had been authorized to execute it.

Motion for new trial denied.

SAME TERM. *Before the same Justices.*

MARSHALL and others vs. GARNER and others.

The owners of a ship involuntarily stranded can not claim a contribution from the owners of the cargo, for the destruction of the masts and rigging, by the master, in order to save the ship and cargo, and the lives of the crew, as general average; where, although the cargo is saved, the ship is finally lost, totally.

ERROR to the superior court of New-York. The action was assumpsit brought by the plaintiffs as owners of the ship North America, against the defendants as owners of the cargo on board that vessel, for a contribution to a general average. The superior court rendered judgment for the defendants, and the plaintiffs brought a writ of error.

T. Sedgwick, for the plaintiffs in error. I. The masts, spars and sails were voluntarily sacrificed for the common benefit.

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The sacrifice resulted in the rescue of the cargo from the peril by which it was threatened. The cargo should contribute to replace the value of the property sacrificed; and the loss of the ship, which in fact never took place till two months afterwards, can not affect the principle. II. To make out a case of contribution against the cargo, it is not necessary that the vessel should be ultimately saved. It is only requisite that the vessel should be so far saved from the immediate peril as to produce the safety of the cargo. It is not requisite that *all* the interests at hazard should be benefited. (*Dig. Lib.* 14, *tit.* 2, c. 3, and c. 5, § 2. *Bradhurst v. Columbia Ins. Co.*, 9 *John.* 9. *Scudder v. Bradford*, 14 *Pick.* 13. *Sims v. Gurney*, 4 *Binn.* 513. *Gray v. Waln*, 2 *S. & Rawle*, 229. *Walker v. U. S. Ins. Co.*, 11 *Id.* 61. *Caze v. Reilly*, 3 *Wash. C. C. R.* 298. *Col. Ins. Co. v. Ashby*, 13 *Peters*, 331.) III. If there is conflict of judicial opinion on the question, the decision of the supreme court of the United States should be accepted as controlling, and that tribunal has declared a case like the present to be one for general average. (*Col. Ins. Co. v. Ashby*, 12 *Peters*, 331. 3 *Kent's Com.* 5th ed. 239.)

H. Ketchum, for the defendants in error. I. The vessel in this case, by force of the winds and waves, was driven on shore. She was driven over the outer bar, and was in four feet of water, when she drew fifteen feet. She was therefore an involuntary wreck when her masts were cut away, and the injury done to the ship thereby, is not a loss for the reparation of which the cargo is bound to contribute. For (1.) If the cutting away of the spars was designed to get the vessel off, there can be no general average contribution, for the object was not accomplished. (2.) If the object in cutting away the masts, was to right the vessel, whereby the lives of persons on board, and cargo, could be preserved, without the design or expectation of saving the ship, then no general average could be required, for the vessel was effectually lost at the time of cutting away. (3.) After shipwreck, the whole of the vessel was lost—spars, rigging and hull—and the cutting away of the spars could not therefore be

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regarded as a sacrifice. II. In case of a voluntary stranding, there can be no claim for a general average contribution, when the vessel was not got off; and if there can be no claim for the stranded vessel, there can of course be no claim for the spars which were cut away.

EDWARDS, J. It appears by the bill of exceptions in this case, that on the evening of the 14th of February, 1843, the ship *North America*, bound to New York, upon her homeward voyage from Liverpool, went ashore on a bar near Shrewsbury inlet. That after she struck, she went over on her broadside, where she lay on her bilge. That at this time her masts were cut away, and she righted, so that her cargo was saved. It further appears that the ship was never got off, but became a total wreck. The captain testifies that if the masts had not been cut away, there would have been a loss not only of the ship and cargo, but of the lives of all on board. Upon this state of facts, the plaintiffs, who were owners of the ship, claim a contribution from the owners of the cargo, for the destruction of the masts and rigging, as general average.

If the ship had been restored from the disaster which caused her loss, by the alleged sacrifice which was made, it is not denied that the plaintiffs would be entitled to recover. The question here presented is, whether such right of recovery can be sustained under the particular circumstances of this case.

The counsel for the plaintiffs, on the argument, based their right to recover mainly upon the principle laid down in *Columbia Insurance Company v. Ashby*, 13 *Peters*, 331; (*S. P. Caze v. Reilly*, 3 *Wash. C. C. R.* 298; *Gray v. Waln*, 2 *S. & Rawle*, 229; *Sims v. Gurney*, 4 *Binn.* 413.) In that case it was decided that where, in a case of imminent peril, the captain voluntarily ran a ship on shore, and saved the cargo, the owners of the cargo were liable for general average, although the ship was totally lost. In the case of *Bradhurst v. Columbia Insurance Co.* (9 *Johns.* 9,) which had been previously decided in the supreme court of this state, a different rule had been laid down.

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With the view which I have taken of this case, I do not consider it necessary to decide between these conflicting authorities. If, however, the rule which has been laid down in this state should be regarded as controlling upon us, the plaintiffs, clearly, could not sustain their claim. For, if the voluntary stranding of a ship, followed by a total loss, would not render the owners of the cargo saved, liable to contribution, *a fortiori* they would not be liable where the sacrifice was of a part of a ship already involuntarily stranded, and, finally, totally lost.

The principle upon which general average rests is, that there has been a sacrifice of the property of one person for the safety of the property of another. Ordinarily the sacrifice is of a portion of the ship or cargo; but it may be of the whole, as in the cases above cited. But, in the case before us, there was no voluntary sacrifice of the ship, nor of any part of her. At the time her masts were cut away, she was already stranded upon a beach, where the water was but four feet deep, and she drew fifteen feet. And the captain states that, had the masts not been cut away, the ship would have been broken up, and the lives of all on board lost. It was not the case of a ship rescued from one disaster, and afterwards destroyed by another. The disaster was fatal, and there was nothing to be sacrificed. By cutting away the masts and rigging, their destruction from already existing causes was only anticipated. And the fact that one of the consequences of their immediate destruction was to protract the existence of the ship long enough to save the cargo, can not entitle the owners to contribution.

With these views, I am of opinion that the judgment of the court below should be affirmed with costs.

JONES, P. J. concurred.

EDMONDS, J. dissented.

Judgment affirmed.

SAME TERM. *Before the same Justices.*

HOOK vs. GRAY.

It is well settled that a contract providing for the performance of an illegal act, and having its consideration in such act, can not be enforced; but where the contract is disconnected with the original unlawful act, and is founded on a new and distinct consideration, although for money advanced in satisfaction of an unlawful transaction, an action may be maintained upon it.

ERROR to the New-York common pleas. The suit was brought by Gray to recover of Hook the sum of \$250, and interest, being one half the amount of counsel fees paid by Gray for defending a suit commenced against him by one Christopher P. Tappen, which was carried to the court of errors; upon an alledged agreement by Hook to pay one half of all liabilities which should be incurred by Gray in defending any suit brought, or to be brought, against him by Tappen. The defendant pleaded the general issue, and gave notice of special matter. On the trial the plaintiff gave in evidence the following agreement, under the hands and seals of the parties: "Memorandum of an agreement made and entered into this first day of July, 1842, between John Hook of Westchester county, and state of New-York, of the first part, and John Gray of the city of New-York, of the second part, whereas, upon a settlement of certain accounts and transactions between the parties hereto, relative to fees, &c. collected in the office of inspector of flour of the city of New-York, the said party of the second part did give to the said party of the first part, his certain promissory note, payable ninety days after date, for the sum of \$376,85, as a final settlement of all accounts and balances existing and due by either of the parties hereto to the other, relative to such transactions, and in full settlement and discharge of all claims and demands existing between them, with the exception of certain liabilities and expenses already incurred by the said John Gray, in or about certain proceedings existing between said John Gray and one Christopher P. Tappen, and for which the said John Hook

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was liable to pay an equal one half thereof. And whereas the said John Gray has declined to pay said note above mentioned by reason of certain further proceedings having been taken by the said Christopher P. Tappen, against the said John Gray, relative to the said office of inspector of flour and of the fees of said office, and for any liability already incurred, or hereafter to be incurred, by the said John Gray, in said proceeding the said John Hook is liable, and the said John Hook hereby admits his liability, to pay his equal one half thereof. And whereas the said John Hook is desirous to have the said note paid, and has applied to said John Gray to pay the same, the said note having passed to one Henry F. Ketchum of the city of New-York. Now, therefore, in consideration of the premises, of payment of said note by said John Gray, and the sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, the said John Hook hereby covenants, promises and agrees to and with the said John Gray, to pay him, said John Gray, the full and equal one half of all liabilities of every kind, manner or description heretofore incurred, or which may hereafter be incurred, by the said John Gray, or which he, the said John Gray, may be liable to pay for or by reason of any suit or suits, proceeding or proceedings heretofore brought, now pending, and which may hereafter be brought by said Christopher P. Tappen against said John Gray, or by said John Gray against said Christopher P. Tappen, relative to said office of inspector of flour, or to the fees of said office; hereby covenanting, promising and agreeing to hold said John Gray fully harmless and indemnified in the premises, and to pay such one half of any such liability to said John Gray upon demand."

The plaintiff then produced the note for \$376,85, mentioned in the above agreement, and proved the defendant's indorsement thereon. He next called as a witness David Graham, Esq., who testified that he was acquainted with the plaintiff, Gray, and was employed in his behalf as solicitor and counsel in a suit brought against him by Christopher P. Tappen, about the year 1839. That Tappen filed a bill in chancery before the vice chancellor of the first circuit, against Gray, for the purpose of

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obtaining an injunction against Gray to prevent his receiving the profits of the office of flour inspector of the city of New-York, to which office Gray had been appointed by Governor Seward, in the place of said Tappen, whose term of office had expired during the recess of the senate, and on the ground that the said plaintiff had been illegally appointed to said office. That the witness, in behalf of the said plaintiff, demurred to the bill filed by Tappen. That the vice chancellor gave judgment upon said demurrer in favor of Tappen. That under the advice of witness Gray appealed to the chancellor, who reversed the decision of the vice chancellor. That thereupon Tappen appealed to the court of errors. That after the cause was in the court of errors, witness called upon Gray for \$500, for counsel fees for the argument of the cause before the court of errors, \$250 thereof being the fee of the attorney general of the state, who was associated with witness in behalf of plaintiff upon such argument, and \$250 being witness' own counsel fee for the argument. That receipts were given by witness to Mr. Gray upon receiving said fees. The cause was regularly heard before the court of errors. That the court decided in favor of Mr. Gray, affirming the decision of the chancellor, overruling that of the vice chancellor, and establishing the right of Mr. Gray to the office.

The defendant's counsel admitted that the interest upon the alleged claim of the plaintiff for the one half of such counsel fees, amounted to thirty-two dollars and eighty-three cents, and the plaintiff rested his case. The defendant's counsel called as a witness Jacob Acker, and offered to prove by him the matters stated in his notice, viz. that the plaintiff Gray and the defendant Hook were candidates at the same time for the office of inspector of flour. That their chances of success in obtaining the appointment to the said office of inspector of flour from the then executive of this state, William H. Seward, were about equal. That there was an arrangement entered into between Hook and Gray, whereby Hook was to withdraw his application for the appointment to the said office; that for so withdrawing his application for the said office, and by aiding Gray in obtaining the appointment, Hook was to receive one half the fees and emolu-

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ments arising and accruing from said office of inspector of flour during the time and as long as the said Gray held the said office. That through the aforesaid arrangement between the parties, the said Gray was, on or about the 27th day of May, 1839, appointed to the said office of inspector of flour. That on or about the same time, Gray appointed Hook as deputy inspector of flour. That the said note of \$376,85 was given to the defendant by the plaintiff for his services as such deputy. That the said note was passed by Hook in the ordinary course of business to one Henry F. Ketchum. That the same was duly protested for non-payment. That Gray declined and refused to pay the note, in consequence of certain proceedings at law, instituted by one Christopher P. Tappen relative to said office of inspector of flour, against the said Gray, and until the said Hook should sign an agreement to pay one half the costs and expenses incurred by the said Gray by reason of the said proceedings of Tappen against him, the said Gray, as Hook was to receive one equal proportion of the proceeds of said office of inspector of flour; whereupon the defendant made and executed such an agreement as was mentioned and set forth in the plaintiff's declaration, and that the said liabilities mentioned in the said several counts of the said plaintiff's declaration, if any did occur, arose from an agreement to divide the fees of said office of inspector of flour as aforesaid, and was part of the consideration thereof. To which testimony the plaintiff objected, because the same constituted no defence to the action, and was not admissible under the notice. The court sustained the objection, and refused to permit the testimony to be given. To which decision the defendant duly excepted. Whereupon, the proofs being closed, the judge charged the jury, and they found a verdict for the plaintiff for \$282,83, and the defendant brought a writ of error.

J. T. Brady, for the plaintiff in error.

E. Sandford, for the defendant in error.

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By the Court, EDMONDS, J. The evidence offered on the trial below sought to establish the fact of an original corrupt agreement between these parties, in relation to the office of flour inspector, in order thence to infer that the contract on which this suit was brought, was void, because of the illegality of its consideration. If such original agreement had been the only consideration of this contract, the evidence might perhaps have been proper; for there can be no doubt that the agreement sought to be proved was illegal and void, as corrupt in itself and contrary to principles of public policy. (*Parsons v. Thompson*, 1 *H. Black.* 322. *Tappan v. Brown*, 9 *Wend.* 175. *Law v. Law*, 3 *P. Wms.* 391.) But the contract on which the plaintiff below sought to recover, and which was in evidence, showed very distinctly that that was not the only consideration. That was doubtless part of it, but there were farther considerations, either of which were sufficient to support the agreement. One was Gray's promise to pay the note that was then in the hands of Ketchum, and the other was the sum of one dollar then presently paid to Hook.

It is well settled that a contract providing for the performance of an illegal act, or having its consideration in such act, can not be enforced; but where the contract is disconnected with the original unlawful act, and is founded on a new and distinct consideration, an action may be maintained upon it, though it could not be maintained upon a contract arising out of the illegal act. (*Armstrong v. Toler*, 11 *Wheat.* 267.) In this case, the illegal act has been performed—the unlawful contract executed—before that now in suit was made. Gray's note had been transferred to, and was in the hands of, one who may have been a bona fide holder; and in consideration of his paying that note, this contract was made. The court below might then well have held the promise to be unconnected with the illegal act, and founded on a new consideration, unconnected with the original act, though remotely caused by it. The court, in *Armstrong v. Toler*, illustrate the position by remarking that, however strongly the laws may denounce the crime of importing goods from the enemy in time of war, the act of defending a

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prosecution instituted in consequence of such illegal importation, is perfectly lawful.

In the case before us, the illegal act was the agreement to divide the fees of the office, and create an illegal deputation to a public office. I do not understand the evidence offered as intended to show that the agreement to defend the suit of Tappen was any part of the original agreement. But the case, as made out on the trial, with the addition of the evidence offered, went to show that agreement to have been subsequent and collateral to the alledged illegal act, the direct and immediate consideration of which is not illegal. *Faikney v. Reynous*, (4 Burr. 2069,) was a case very much in point, and is a strong case to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in satisfaction of an unlawful transaction, may be sustained in a court of justice.

It is in obedience to these authorities that I am inclined to think the court below did not err, and their judgment ought to be affirmed.

SAME TERM. *Before the same Justices.*

SHERMAN and wife vs. BURNHAM and others.

A bill can not be filed by husband and wife jointly, against the trustees of the wife's separate estate, appointed under her father's will, for the purpose of removing the trustees; to have an account from them; and to have the estate of the testator distributed agreeably to the will.

Where the wife's separate estate is held by trustees in trust for the wife for life, with remainder to her child, the entire beneficial interest is in the wife and her child, and the husband has no interest therein.

A bill filed against the trustees, for an account of the wife's separate estate, and asking for the removal of the trustees, should be filed by the wife alone, by her next friend, making her husband a party defendant.

The child of the wife, who is entitled to the estate in remainder, is a necessary party to such a bill.

Where a suit is brought by the husband, in the names of himself and wife, it is his

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suit only, and will not be absolutely binding on the wife, or prejudice a future claim by her, in respect of her future estate.

If the objection that a bill thus filed is the bill of the husband alone, is not made in the answer, or by demurrer, but only on the hearing, and not at the first opportunity, the court usually disregards the objection; especially where the matter demanded is a specific sum which the court may order to be secured for the use of the wife, and thus protect her interest, and at the same time fully protect the paying party in obeying the decree of the court. But in a case where the separate estate of the wife is to be ascertained by an account, the court will give effect to the objection, in order fully to protect the accounting party against a subsequent independent claim of the wife.

In all cases where the suit is brought for the purpose of taking a trust fund out of the hands of the trustees, or where it is for an account of the trust fund, being in fact a bill for the execution of the trust, all the *cestuis que trust* must be parties.

Where a bill is filed in behalf of a devisee, against the trustees of the estate of the testator, praying in general terms, for an account of the estate and effects of the testator and of every part thereof, without confining the prayer to the property which has come to the hands of the trustees as such, the personal representatives of the testator are necessary parties; as they only can render the account called for.

IN EQUITY. This was an appeal, by the plaintiffs, from an order of the Hon. A. L. Robertson, late assistant vice chancellor of the first circuit. The bill alleged that Michael Burnham, late of the city of New-York, departed this life on the 19th of January, 1836, seised and possessed of considerable real and personal estate, leaving his last will and testament, duly executed, so as to pass real estate. That by such last will the testator gave and devised unto his sons Warren S., Henry and Charles, all his real estate *in trust*, after the death of the testator's wife, to sell and dispose of the same: and the testator declared his will further to be that the moneys arising from such sale or sales should be deemed to be part of his personal estate, and that his wife should receive one-third of the rents and profits of the real estate for life, and that the residue of the clear yearly rents and profits, in the meantime, until the real estate should be sold, should be deemed to be part of his personal estate, and subject to the dispositions of the will concerning his personal estate. As to the personal estate which should remain, after payment of his debts, and funeral and testamentary charges, the testator gave the

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same to his said trustees, upon the trusts and for the intents and purposes, and under and subject to the powers, provisos, declarations and agreements in the will after expressed and declared; that is to say amongst other things, upon trust that the trustees should invest the same in public stocks, or on real securities, at interest, and should pay or transfer all such principal moneys, stocks, funds and securities unto his sons Warren S., Henry, Charles, Michael, James and Thomas, and his daughters Elizabeth, Harriet, Ellen and Anna, equally to be divided among them, share and share alike; the shares of the sons to become vested in them respectively, and to be paid to them, on their attaining their respective ages of twenty-one years; and the shares of the daughters to be vested in the trustees, and applied and disposed of in the manner afterwards stated in the will; with the proviso, however, that if any of the children of the testator, being a son or sons, should die before attaining the age of twenty-one years, or, being a daughter or daughters, should die without leaving lawful issue, then the share of him, her or them so dying should go and accrue to the survivors and be equally divided amongst them. And upon the further trust that the trustees should pay and apply the dividends or interest of the share or shares of such of his said sons as should not have attained the age of 21 years, and of such of his daughters as should be under the age of 21 years and unmarried, for and towards his, her or their maintenance and education respectively. And with respect to the shares of his said daughters respectively the testator declared his will to be that the trustees should pay the dividends, interest and income thereof from the time when his said daughters should attain their respective ages of 21 years, or be married, (which should first happen,) into the hands of his said daughters respectively, for their sole and separate use and benefit, exclusively of their husbands; and that after the decease of his said daughters respectively the shares of such of them as should leave lawful issue should go to, and become vested in, such issue, and the shares of such of them as should die without leaving lawful issue should go and accrue to the survivors of his children. The testator further

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declared his will to be that when, and so often, as any of his trustees should die, or refuse to act, or be desirous to be discharged from, or become incapable of acting in the execution of the said trusts, it should and might be lawful for the other trustees to nominate and appoint any other trustee or trustees for the purposes mentioned in the will, in the place of the trustee or trustees so dying, or refusing to act, or desiring to be discharged. The testator, in and by said will, appointed his sons Warren S., Henry and Charles executors thereof, and guardians of his other children during their respective minorities. The bill alledged that the said Warren S. Burnham and Henry Burnham died before the testator, intestate, unmarried, and without lawful issue; that the testator left him surviving his wife, and the following children: Charles Burnham, Michael Burnham, James M. Burnham, and Thomas Burnham, Anna, now the wife of Henry Sherman the plaintiff, and three other daughters. That the said Thomas Burnham died, on the 21st of August, 1841, under the age of 21 years, intestate, unmarried, and without lawful issue, and the said Charles Burnham died on the 23d of February, 1843, intestate, unmarried and without lawful issue, and after he had attained the age of 21 years. That on the 18th of March, 1836, letters testamentary upon said will were issued to Charles Burnham, the sole surviving executor, and that he took upon himself the execution of said will, and of the trusts therein expressed. That on the 26th of July, 1839, the said Charles Burnham, as sole surviving executor of, and trustee under, the said will, by an instrument in writing reciting the power contained in the will for that purpose, appointed the defendant Michael Burnham, one of the testator's sons, to be a trustee in the place of Warren S. Burnham and Henry Burnham deceased, who accepted such appointment. That after the death of Charles Burnham letters of administration upon his estate were issued to the said Michael Burnham and the defendant James M. Burnham; that from the death of the said Charles the said Michael solely assumed the execution of the trusts of the said will, and entered into possession of all the estate which was of the said testator Mi-

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Michael Burnham deceased, and all the books, vouchers and securities belonging to said estate, and assumed the administration thereof and the execution of said will; although the plaintiffs charged that the said Michael had never been appointed or qualified as administrator on the unadministered estate and effects which were of the said testator, but had assumed so to act *as executor in his own wrong*, and from thence hitherto had continued in the sole possession of the said estate, books, vouchers, securities, &c. as such trustee and executor and trustee, and still possessed the same as such. The bill charged the defendant Michael Burnham with having made various improper sales of the property belonging to the estate, and alledged that Charles Burnham never rendered to the surrogate any account of his doings as executor and trustee; that he never made any division or distribution of the estate, among the devisees and legatees, and never paid or transferred to them, or any of them, or to himself as trustee for the plaintiff Anna A. Sherman, or for any of the daughters of the testator separately, any of the principal moneys, stocks, funds or securities of the estate, or the proceeds or avails, or income, or rents and profits thereof. The bill alledged that the plaintiffs intermarried on the 20th of September, 1843, and that the plaintiff Anna A. Sherman became of the age of 21 years on the 28th day of December thereafter; whereby the plaintiffs became entitled to have and receive from the said Michael Burnham, as trustee, an accurate inventory and account of the estate of the testator, and of Mrs. Sherman's portion of such estate; and that the plaintiffs also became entitled to have and receive from the said Michael Burnham and James Burnham, as administrators of the estate of the said Charles Burnham deceased, a full and accurate inventory and account of Mrs. Sherman's portion of the estate of Michael Burnham deceased which came to the hands of the said Charles as her guardian, and of the rents, issues and profits thereof, together with an account of all the expenditures made on her behalf, during her minority, from the death of the testator to the death of the said Charles; and also from the said Michael as trustee, from the time of Charles' death to the time when Mrs. Sherman

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became of the age of 21, &c. ; but that they had refused to render the same. The bill then charged that the defendant Michael Burnham was negligent and inattentive to his duties as trustee, and improvident and prodigal in his expenditures ; that the plaintiffs had requested him to nominate and appoint two other trustees in association with himself, so as to fill up the original number appointed by the testator, in his will, but that for a long time he refused to make any new appointment ; that finally, on the 22d of January, 1845, in opposition to the remonstrances and protests of the plaintiffs, he appointed the defendant James Burnham such trustee, whom the plaintiffs alleged to be an improper person to be thus appointed. The bill charged that the defendants had given no security for the faithful execution of their trusts, and that the rights and interests of the plaintiffs were unsafe in their hands. The bill set forth the execution of a deed, on the 1st day of February, 1841, by Michael Burnham and wife and Elizabeth Burnham, the widow of the testator, to Charles Burnham, Elizabeth Burnham, James M. Burnham, Thomas Burnham, Harriet Russ, and the plaintiff Anna A. Sherman, by virtue of which the grantees, each, became entitled to, and was seised and possessed absolutely and in their own right, of one-seventh part of the portion of the estate of the testator, (being one-eighth part thereof,) given by the will, and which under and by virtue of such will came, or should come to said Michael Burnham, the son ; and also to all estates in reversion and remainder, and all benefit and advantage which might come or accrue to him by virtue of the provisions of such will ; and also that on the death of Thomas Burnham and Charles Burnham respectively, Mrs. Sherman and the other surviving grantees in that deed became in like manner entitled to all the estates and interests of the said Thomas and Charles in the estate of the testator which they the said Thomas and Charles, or either of them, derived under and by virtue of the will of the testator or the said last mentioned deed.

The bill prayed for an account from the defendants, and that they might be decreed to pay to the plaintiffs what, upon such accounting, should appear to be due to them, or either of them ;

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that the defendants might be removed from their office of trustee, and other and new trustees be appointed in their stead, and also that a third trustee might be appointed; and that the estate of the testator might be distributed agreeably to the will. The bill also prayed for an injunction, and a receiver.

Answers were put in, by the defendants, and proofs taken. It appeared from the proofs that since the filing of the bill, Mrs. Sherman, the plaintiff, had given birth to a child, who was not made a party to the suit. On the 30th of December, 1846, the assistant vice chancellor made an order as follows: "It appearing that the bill and proceedings in this cause are defective for want of proper parties—but such defect has not been set up by the defendants, or any of them, in their answer to the complainants' bill of complaint—and it appearing to the court that this suit involves the distribution of a fund claimed to be in the hands of the defendants, Michael Burnham and James M. Burnham, a part whereof, it is alledged, is the separate estate of said Anna A. Sherman, one of the complainants, and it also appearing that there is no personal representative of the estate of Michael Burnham, deceased, made a party to this suit, and it not appearing by the proceedings or proofs in this cause whether any and what children of the daughters of Michael Burnham, deceased, are in existence, and this court being unwilling to make any decree in relation to said fund before the said Anna A. Sherman shall be properly represented and made a party to this suit, in regard to her said separate estate, and also that such personal representative and children of the daughters of the said Michael Burnham, deceased, if any, should also be made parties to this suit; it is ordered that it be referred to Stephen Cambreling, Esq. one of the masters of this court, to inquire whether there are any such personal representatives, or children, and who the same are, and generally whether all persons who are interested in the fund, the distribution or an account whereof is sought in this suit, are made parties, and, if not, who such persons are, and that the said master report thereon with all speed. And it is further ordered that the hearing of said cause stand over in order to enable the said complainants, on the com-

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ing in and confirmation of the said master's report, to make such persons parties as said master shall report to be such necessary parties. And it is further ordered that the said complainant, Henry Sherman, have liberty to add such parties, either as co-defendants or co-complainants, as he may elect ; if complainants, by suitable amendments of the bill in relation to their interests, or if defendants, by like amendments, or supplemental bill, as he may be advised, and to add the said Anna A. Sherman, by a next friend, as complainant, or to add her name as a co-defendant, and amend the bill and proceedings in this cause by striking out her name as a complainant therein. And it is further ordered that the said complainant, Henry Sherman, shall not be permitted to add the said Anna A. Sherman, by her next friend, as a co-complainant, unless he amend the prayer of his bill by striking out therefrom so much thereof as seeks to appoint or remove any trustee of the separate estate of the said Anna A. Sherman, and consents (reserving his right thereto in any future suit,) not to ask in this cause any relief wherein he may have an interest adverse to that of his wife, the said Anna A. Sherman, in regard to her separate estate, such consent to be filed and a notice thereof served as hereinafter directed. Nor shall he be permitted to add, as co-complainants, any other parties interested in the removal of or appointment of trustees of the estate and funds mentioned in the bill of complaint, without a consent to waive all right to proceed for such removal or appointment in this cause, (without prejudice to any new bill to be filed therefor,) such consent to be filed, and a copy thereof, with notice to be served in manner aforesaid. And it is further ordered that the said complainant, Henry Sherman, elect whether he will amend the pleadings and proceedings in this cause in the matters aforesaid, and the manner in which he shall so elect to amend the same, by serving notice of such election, in twenty days from the date hereof, on the solicitor for the defendants Michael and James M. Burnham, and shall actually amend the same in ten days after the confirmation of said master's report by such amendment and consent as aforesaid, or else that the bill in this cause be dismissed, with costs

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to the defendants Michael, James and Elizabeth Burnham, without prejudice to the complainants, or either of them, filing a new bill making proper parties. And it is further ordered, that in case the said Henry Sherman elect to make any such amendments, that he pay to the solicitor for the defendants Michael Burnham, James Burnham, and Elizabeth Burnham, the costs of this present hearing, to be taxed, excepting therefrom the costs of any papers furnished to the court on such hearing, and that the question of the costs of said amendments and proceedings, in case the same shall be made or had, and of this hearing, be reserved until the final hearing, and that all other questions and equities be reserved until such final hearing."

From this order the plaintiffs appealed.

H. Sherman, for the plaintiffs.

Ralph Lockwood, for the defendants.

By the Court, EDMONDS, J. Mrs. Sherman has an interest in her father's estate: 1. As cestui que trust of a share devised to her use for life, with remainder to her issue, the income payable to her, irrespective of her husband. 2. As purchaser in fee of a portion of Michael B.'s share: and 3. The bill claims that under that purchase she acquired her brother Michael's share in the portions of her brothers Charles and Thomas. This last claim is denied by the answers: Michael insisting that his interest in Charles' and Thomas' portions did not pass by his conveyance; but the two first statements of her interest are admitted.

The object of the bill is, 1. To remove the trustees of her estate, appointed under her father's will: 2. To have an account as well of all the estate of her father, as of the rents and profits received by the trustees upon that part which they hold in trust for her for life, and upon that part whereof she is seised in fee: and 3. To have the estate distributed agreeably to the will.

In the part which is held in trust for Mrs. Sherman for life, with remainder to her child, it is manifest that her husband has

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not any interest whatever ; the entire beneficial interest being in her and her child. The bill asks an account of this part thus situated, and for the removal of the trustees, without making the child a party to the suit, or making Mrs. Sherman a party, except as she is joined with her husband as co-plaintiff. Can this be allowed ?

The suit can be controlled entirely by the husband, who has no interest, and in defiance of the wishes of those who alone have an interest. Could the trustees make a valid contract with him to surrender their trust into his hands ? Could they render to and settle with him an account of the estate thus held by them in trust ? Clearly not. Then upon what principle could the court compel them to do either ? The trustees could not be discharged either from their trust or upon an accounting, without bringing properly into court the real parties in interest, namely, Mrs. Sherman and her child.

It is insisted, however, that Mrs. Sherman is a party in a proper manner, and indeed in such manner that she may properly be regarded as representing her child's interest. Where a suit is brought by the husband in his own name and in that of his wife, it is his suit only, and will not be absolutely binding on her. (*Story's Eq. Pl.* § 61. *Grant v. Van Schoonhoven*, 9 Paige, 255. *Griffith v. Hood*, 2 Ves. 452. *Simons v. Horwood*, 1 Keen, 7. *Hughes v. Evans*, 4 S. & S. 188.) But on his death she may abandon it without even being liable for costs ; and the suit is abated by his death unless she chooses to proceed. (*Story's Eq. Pl.* § 361.) And where the suit is brought by the wife for her separate property it is incorrect practice for the husband to be made a co-plaintiff. She ought to sue as sole plaintiff by her next friend, and the husband be made a party defendant ; for he may contest that it is her separate property, and the claim may be incompatible with his marital rights. (*Story's Eq. Pl.* § 63. *Sigal v. Phelps*, 7 Sim. Rep. 239. *Wake v. Parker*, 2 Keen, 59.) In the latter case, Lord Langdale remarks, that in cases of account, where the wife is, as to her separate estate, entitled to prosecute a suit by her own authority, independent of her husband, there seems to be no

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reason why a suit brought by her husband should bind her; why she may not at any time institute a new suit for the same matter, by her next friend; or why a decree should be a bar to a new suit instituted by her next friend. And the court, in *Hughes v. Evans*, (1 Sim. & Stu. 185,) held that where the husband and wife join in the suit as plaintiffs it is to be considered as the suit of the husband alone, and will not prejudice a future claim by the wife in respect of her separate estate. And this is upon the principle that not only ought the wife to be protected in the enjoyment of her separate property, but the parties who are sued ought to be protected against concurrent or consecutive demands of the husband suing in the names of himself and wife, and of the wife suing by her next friend.

It must not, however, be overlooked, that the objection which we are considering was not made in the answer, or by demurrer, but only on the hearing, and not at the first opportunity which the defendants had to make it. In such case it is not uncommon for the court to disregard the objection that the bill is the husband's alone; especially where the matter demanded is a specific sum which the court may order secured for the use of the wife, and thus protect her interest, and at the same time fully protect the paying party for obeying the decree of the court. But in a case where the separate estate of the wife is to be ascertained by account, the court feels itself bound to give effect to the objection, in order fully to protect the accounting party against a subsequent independent claim of the wife; and because the wife appears to have a right to have her separate estate ascertained by a proceeding of her own, independently of her husband. (*Wake v. Parker, supra. Calv. on Part. ch. 3, § 21, pp. 365, 374.*)

Thus far, then, the assistant vice chancellor was right in refusing a decree for an account, on the husband's bill alone; unless it was amended by making the wife a party by her guardian ad litem.

But whether her child ought also to be a party is another question. It is very clear to me that in the present condition of this case, it being the husband's bill alone, and the wife not

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being a party independently of him, she is not in a condition adequately to represent the whole share and protect her child's interest in the residuum from the encroachments of her husband. She appears only as a plaintiff with, and in subordination to, her husband, in a suit which, so far as she is concerned, is entirely under his control. (*Simbns v. Horwood*, 1 *Keen's Rep.* 7.) In what form and by what proceeding can she interfere independently of him, or antagonistical to him, for the protection of her child's interest? But if she were a party independent of him, acting by her guardian ad litem, she could not be regarded as representing the whole interest, as well the remainder as the particular estate. For while, as a general rule, it is sufficient to bring before the court the first person in being who has a vested estate of inheritance, together with those claiming the prior interests, (for instance a tenant for life,) omitting those who may claim in remainder or reversion after such vested estate of inheritance, it is also a general rule that in suits respecting the trust property, all beneficially interested are necessary parties. (*Mitf. Pl.* 173. *Eagle Fire Ins. Co. v. Cammet*, 2 *Edw. Rep.* 128.) Here the first estate of inheritance is in the child of Mrs. Sherman, who must be made a party.

In all cases where the suit is to take the trust fund out of the hands of the trustees, or where it is for an account of the trust fund, being in fact a bill for the execution of the trust, the cestuis que trust must all be parties. (*Manning v. Thesiger*, 1 *S. & S.* 106. *Hamm v. Stevens*, 1 *Vern.* 110. *Calv. on Part.* 211.) Where the suit is merely to enable the trustees to get possession of the trust fund, the cestuis que trust may be omitted, but not where it relates to the execution of the trust. (*Calv. on Part.* 214.)

The tenant for life represents the entire fee only under peculiar circumstances, (*Calv.* 192,) as for instance, the case where the remainderman in tail is not in esse. (2 *Vern.* 526.) But such persons only are represented by the tenant for life, whose interest may be barred by the child of the tenant for life. (*Lloyd v. Johnes*, 9 *Ves.* 55.) The assistant vice chancellor was then

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right also in exacting that Mrs. Sherman's child should be a party to the suit.

Whether the personal representatives of Michael Burnham, the testator, ought to be parties, must depend on the frame and scope of the bill.

It asks for a just, full, true, and particular account of all and singular the estate and effects of the testator Michael Burnham deceased, and of every part thereof, as well against Michael jun. and James, as administrators of the surviving executor, as against Michael as executor *de son tort*, and praying that such account may set forth the particular nature, quantities and qualities, and true and utmost value of the estate and effects of the testator, and of every part thereof, and how it has been disposed of, and when, and to whom, and for what consideration, and whether any and what part remains undisposed of, and why. If the bill had confined itself to the property which had come to the hands of the trustees as such, there might, perhaps, be force in the objection that the personal representatives were not necessary parties; but when it goes farther, and seeks of the defendants that account which can only be rendered by the representatives of the testator, they must of necessity be made parties; for otherwise the accounting would not bind the estate. It is doubtless to avoid this obvious difficulty that the bill seeks to charge Michael jun. as an executor *de son tort*; evidently overlooking the provision of our statute (2 R. S. 449, § 17) which abolishes all liability as executor *de son tort*, but subjects a party who interferes with the property of a deceased person to responsibility as a wrongdoer, to the executors or general or special administrator of the deceased person.

In all three of the aspects, then, in which the assistant vice chancellor has thought the cause should stand over for the addition of other parties, I am inclined to think he was right, and his decree ought to be affirmed with costs.

I have not overlooked the suggestion of the plaintiffs that they were properly joined as plaintiffs, because the wife had a joint interest with her husband. But the obvious answer is that the bill is not confined to that joint interest, but goes far-

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ther, and aims at her separate estate. In order to reach that, she ought to be made a party by her next friend, independently of her husband, as representing the life estate, and her child as seised of the remainder. It is this phase of the bill which renders other parties necessary; and that necessity is not obviated by the fact that the bill includes, with her separate estate, a demand of relief as to a joint interest.

Decree of the assistant vice chancellor affirmed with costs.

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SAME TERM. *Before the same Justices.*

GARR vs. SELDEN.

To impute to a professional man ignorance, or want of skill, in a particular transaction, is not actionable. To be actionable, words of that character must be spoken or written of him generally.

But words imputing to a lawyer a want of integrity, whether they are used generally of his profession, or particularly as to some one transaction, are actionable.

Accordingly held actionable to charge an attorney with revealing and disclosing confidential communications made to him by his client, for the purpose of aiding and abetting another person, with whom he has combined and colluded, and of injuring his client.

DEMURRER to declaration. The action was for a libel. The declaration alledged that the plaintiff was an attorney and counsellor at law and a solicitor in chancery; that having been concerned in the prosecution of divers suits, &c. for the defendant Selden and one Richards, upon their retainer, he commenced in action in this court against them for the recovery of moneys claimed by the plaintiff to be due from them to him, for his work, labor and services as such attorney, counsellor, and solicitor, in and about the prosecution of those suits, &c.; that the defendant and said Richards pleaded the general issue

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in the said action, and annexed thereto a notice of special matter, a part of which was in these words :

“And these defendants will further prove on the trial of this cause, that the said plaintiff conducted the prosecution and defense of the several suits, and attended to the other professional services of attorney, solicitor and counsellor in said declaration, in so careless, negligent, unskillful, undue and improper mode and manner, as to render such professional services, and every part thereof, wholly abortive, and of no value to the said defendant.” That the plaintiff made a motion, to the court, to strike out that part of the notice, as false and slanderous ; that in opposition to said motion the defendant Selden made an affidavit, and read and published the same in open court, on the hearing thereof, and placed the same on the files of the court, containing among other things the following *irrelevant, impertinent*, false, scandalous, defamatory and libellous matter, to wit : “David Selden, one of the said defendants, deposes and says, that the said plaintiff revealed and disclosed confidential communications which deponent had made to said Garr as the attorney of the deponent and said Richards, relative to a portion of the professional business for which this suit is brought. And that said Garr revealed said communications for the purpose of aiding, assisting, and abetting an individual who had an interest adversely to the deponent and said Richards. That said Garr combined and colluded with that individual to devise plans to injure deponent and said Richards, and prejudice their pecuniary and other rights. And deponent means to be understood, that said Garr made use of and revealed the said confidential communications, as one of the means by which he and the said individual were to accomplish the said object ; and that the said Garr has grossly violated his duty to the deponent and the said Richards, in the transaction of the said litigations and business.”

To this declaration the defendant demurred, and assigned the following causes of demurrer. 1. That it does not appear that the libel was ever *published*. 2. That the declaration charges *no specific* offense against the defendant. 3. That the affidavit

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alleged to be libellous was part of a *judicial proceeding*, and was *relevant* and *pertinent* thereto. 4. That it does not appear by the declaration that the matter alleged to be libellous, was published with *malice*, nor that it was *false*, nor that it was not *pertinent* and *relevant*. 5. That the affidavit was a *privileged communication*, and can not by any possibility be a libel. 6. That the plaintiff's only remedy is by a *special* action on the case, in the nature of an action for a malicious prosecution.

C. W. Sandford, for the plaintiff.

P. Y. Cutler, for the defendant.

By the Court, EDMONDS, J. To impute to a professional man ignorance or want of skill in a particular transaction, is not actionable. To be actionable, words of that character must be spoken or written of him generally. It is not so, however, of words which impute want of integrity. They are actionable, whether used generally of his profession or particularly as to some one transaction. The words in this case impute want of integrity, and are actionable, *per se*.

It is averred that they were pertinent to the matter in hand, and therefore privileged. But in the mean time the count avers that they were used maliciously, and were not pertinent. If so, they were not privileged, but actionable; and we can not hold, as the demurrer claims, that these words, thus used maliciously and not pertinent, are not actionable.

The demurrer must be overruled, with leave to amend, on payment of costs.

SAME TERM. *Before the same Justices.*

THE NEW-YORK AND HARLEM RAILROAD COMPANY *vs.*
STORY and others.

In an action by one party to an executory contract for work and labor, against the other, to recover the damages sustained by the plaintiffs in consequence of the suspension of the work by the defendants, the market price or fair value of the work agreed to be performed by the plaintiffs, on the day of the breach, is to govern in the assessment of damages.

The difference between the price which the plaintiffs were to receive from the defendants and the price which they were to pay their sub-contractors for doing the work, is not the true measure of damages.

The damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not by the market price of labor and materials at the time fixed for full performance.

ERROR to the superior court of New-York. Story and others sued the Harlem Railroad Company in covenant upon a sealed contract made by the plaintiffs with the railroad company for making about twelve miles of the Harlem Railroad, from Williamsbridge to White Plains. By this contract the contractors were to be paid half in the bonds of the company and half in cash. "The cash portion to depend upon a subscription made by the inhabitants of Westchester county." And in case that subscription should not be paid, the company reserved the right of stopping the work until they could obtain such installments. The terms of the Westchester subscription were that the subscribers were to loan to the company the amount set opposite to their names, payable in ten monthly installments commencing August 1, 1841, with interest. The company were to execute their bonds to each subscriber, for the amount subscribed, payable in five years, with interest semi-annually, secured by a mortgage to Gouverneur Morris, (including the sum of \$40,000 then due to him) as a first lien upon the road, from Harlem river to White Plains. The Westchester subscribers paid one or two of the installments. The railroad company never gave the mortgage, and they could not give it; not having obtained the right of way. In consequence of this default the Westchester

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subscribers refused further payment. The railroad company ceased paying the contractors, and finally, in September, 1842, stopped the plaintiffs in their work, and prevented them from fulfilling their contract. The plaintiffs had sub-contracted for the entire work, at fixed prices, which, if they had been allowed to complete their contract, would have given them a profit. The sub-contracts were made under the eye, and with the approbation, of Mr. Shipman, the engineer of the company. The cause was referred to referees to hear and determine. On the trial before them the plaintiffs proved the execution of the contract, and the amount of labor performed by them up to the time they were stopped by the company. They also proved, by the engineer, the amount of profits which they would have made, had they been permitted to complete the contract ; being the difference between the contract price of the entire job and the amount for which they had contracted to have the same performed by sub-contractors. The referees reported in favor of the plaintiffs for \$19,020,51 ; the report specifying the items upon which it was founded, with the conclusions of the referees upon the proofs. It embraced an allowance for the work done under the contract, by the plaintiffs, at the time they were stopped ; interest upon the balance due them on that account ; damages in consequence of suspending the work ; and nominal damages. The report was confirmed by the superior court, and judgment was given for the plaintiffs ; whereupon the defendants brought a writ of error.

C. W. Sandford & C. O'Connor, for the plaintiffs in error.

S. Sherwood, for the defendants in error.

By the Court, EDMONDS. J. This court can review this case only on questions of law ; and we therefore necessarily lay out of view many of the considerations suggested in the arguments of the counsel, because they involve mere questions of fact. The first objection is of this character. It does not appear that the referees ruled that the approval of Shipman was conclusive as

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to the quantity and quality of the work performed. If they had so held it would have been improper for them to receive the testimony of Anderson and Shotwell.¹ They received that testimony, however, as well as that of Shipman; and whether they were right or wrong in giving superior weight to Shipman's evidence, is a question which we cannot consider, because it is a question as to the weight of testimony, peculiarly within the province of the referees and the court below.

The second objection may involve both questions of law and fact: of law so far as it relates to the construction of the contract, and of fact so far as the question is raised whether the stoppage of payments by the Westchester subscribers was not caused by the railroad company. It is difficult to ascertain, from the case, on which of these grounds the referees found for the plaintiffs below. They may have found for the defendants below on the question of law and have concluded that the failure of the Westchester subscribers to pay their several amounts gave the railroad company a right to stop the work; yet as a matter of fact they may have found that such failure was caused by the railroad company itself, and that therefore it was not competent for the company to set up such failure as a defense to the claim in this suit. It would not therefore be proper for this court to entertain this objection, as they might be dealing in matters of fact, which, on this hearing, are not within their province.

The *third* objection is also of the character of those which we cannot, as a court of errors, review. It is that damages were allowed by the referees without having evidence of the nature and amount of those damages. They had evidence before them, on that subject, and whether they gave to that evidence its proper weight, or arrived at a just conclusion upon it, are questions of fact not properly before us.

The *fourth* objection, however, may involve a question of law, in this, that it may raise the inquiry whether the difference between the price which the contractors were to receive from the railroad company and the price which they were to pay their sub-contractors was the true measure of damages. It is evident that that was the rule which the referees adopted; but it is not

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so evident that it was not so adopted only as a mode of ascertaining the actual value of a good bargain to the contractor, which is a legitimate item of damages, and constitutes a ground of recovery. The testimony was that the witness had the sub-contracts in his possession and made an estimate of the profits which the contractors (the plaintiffs below) would have made by reason of their having sub-contracted the work for less than they were to receive. The motion to strike out this testimony was denied by the referees, not because that was a proper measure of the damages, but because the evidence was competent, and the questions whether the referees would adopt it, or how far they would be governed by it, were questions on the merits, to be finally adjudicated. In their final adjudication they announced their determination on this point in these words: "Damages sustained by the plaintiffs by reason of the suspension of the work, and not being permitted to complete contract, \$6624.44." And in the application made in the court below to set aside the report, the defendants below assumed, as one ground of objection, that the referees had allowed as damages the estimated profits which would have resulted in case the sub-contracts had been performed. The referees did not, nor did the court below, any where decide that such difference was not the just measure of damages; but the referees expressly reserved to the final adjudication, the question whether they would or would not adopt it. Now when we consider that the referees, on their final adjudication, awarded for damages in this regard, the precise sum which was arrived at by the witness on a calculation of the difference between the contract and sub-contract prices, that they received no evidence as to the market value or fair price of the work to be performed, estimated as of the time when the contract was broken, and that the court below overruled the objection founded expressly on the assumption that such had been the rule of damages, we are warranted in supposing that the referees did adopt it as their measure of damage, and that the court below sustained them in it.

In this there was error, (*Masterton v. Brooklyn*, 7 Hill, 61;) and for this simple reason, that the market price or fair value

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on the day of the breach is to govern in the assessment of damages; and they are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. Whereas the rule which I assume that the referees adopted, and which alone would warrant the testimony they received, has reference solely to the period of the full completion of the work.

The *fifth* objection relates to the allowance of interest, and is founded on the allegations that it was not demanded on the trial, and that it is not warranted in law. The first of these allegations is for the court below alone, and the latter is the only one we can consider. The referees have doubtless allowed interest on the ground that the evidence warranted them in finding that as to the sum on which they allowed interest, there was a stated account and a balance struck. If the evidence warranted this finding, they were right in allowing interest; and whether it did warrant such finding is a question which it is not in our province to consider. We cannot therefore say there was error in this.

For the error then of the referees in the rule of damages which they adopted, and in receiving the testimony which they admitted on that point, their report ought to have been set aside. The judgment of the superior court must be reversed, and a venire de novo awarded.

SAME TERM. *Before the same Justices.*

LAWRENCE vs. WARDWELL.

In an action by a lessee, against the lessor, to recover damages for a refusal to give possession of the demised premises, the plaintiff can not, for the purpose of showing the amount of damages sustained, give evidence of an advantageous contract for the assignment of the lease, or of an offer to purchase it, by another person.

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Nor is such evidence admissible for the purpose of showing the value of the lease.

The amount paid by the plaintiff to workmen whom he was obliged to discharge in consequence of not being able to get possession of the premises at the time agreed upon, is a proper item of damage, in such an action, if specially claimed in the declaration.

THIS was an action brought by the plaintiff to recover damages of the defendant for his refusal to give the plaintiff possession of the lofts of a store in Cedar-street, New-York. By a lease executed in February, 1844, the defendant rented the lofts to the plaintiff for one year from the 1st of May thereafter, at a rent of \$500. The defense was that at the time of executing the lease the plaintiff represented that he wanted to use the lofts as a warehouse, but that the defendant was afterwards informed that the plaintiff designed to turn them into saddler's work shops, introduce partitions, stoves, &c. and therefore he refused to give possession. The lease was in general terms, containing no restriction as to the purposes for which the lofts were to be occupied. The cause was tried at the New-York circuit in March, 1846, before Edmonds, circuit judge. The jury found a verdict for the plaintiff for \$350, and the defendant moved for a new trial.

D. M. Cowdrey, for the plaintiff.

S. Sherwood, for the defendant.

By the Court, EDWARDS, J. The circuit judge was right in excluding the testimony which was offered as to the contemplated use of the premises in question. The written lease contained no restriction as to their use; and it was not proposed to show that the alledged intended use would be injurious to the property.

The material objection which was made by the defendant on the trial, was to the introduction of testimony as to the offer which was made to the plaintiff, by the witness Churchill, for the purchase of the lease. The witness stated that his impres-

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sion was that he offered the plaintiff \$2000. And the verdict of the jury shows that they relied on his testimony in estimating the value of the lease. The general rule in reference to damages is, that they must be the natural and proximate consequence of the act complained of. (2 *Greenl. Ev.* p. 256.) The particular application of this rule has been fully and clearly explained in *Masterton v. The Mayor of Brooklyn*, (7 *Hill*, 62.) In that case the court held that although as a general rule, damages for anticipated profits could not be recovered in an action for a breach of contract, on the ground that they were too remote and uncertain, still that those profits and advantages which were the direct and immediate fruits of the contract entered into between the parties, stood upon a different footing. "These," said Chief Justice Nelson, "are part and parcel of the contract itself, entering into, and constituting a portion of, its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon, and formed perhaps the only inducement to the arrangement." And there are numerous cases which he cites as illustrative of the rule laid down, in which the plaintiff has been held entitled to recover the difference between the contract price of a thing, and its value on the day on which the contract was to be performed. (*Boorman v. Nash*, 9 *Barn. & Cress.* 145. *McLean v. Dunn*, 4 *Bing.* 722. *Leigh v. Patterson*, 8 *Taunt.* 540. *Gainsford v. Carroll*, 2 *Barn. & Cress.* 624.) But he further says that "the loss of any speculation, or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So a good bargain made by a vendor in anticipation of the price of the article sold, or an *advantageous contract of resale* made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded, as too remote and contingent to affect the question of damages."

According to the principle here laid down the plaintiff would

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not have been authorized to give evidence of an advantageous contract for the improvement of his lease. And if he would not have been authorized to give evidence of a contract, he certainly was not justified in giving evidence of a mere offer; neither was this testimony admissible for the purpose of showing the value of the lease.

The next objection taken by the defendant was to the testimony which was introduced as to the loss which the plaintiff sustained, by being compelled to pay the men that he was obliged to discharge, owing to his not being able to get possession of the premises at the time agreed upon. This was a proper item of damage, within the rule laid down in *Driggs v. Dwight*, (17 Wend. 71.) And as it was specially alledged in the declaration, the testimony was admissible.

New trial granted, costs to abide the event.

SAME TERM. *Before the same Justices.*

BACON vs. TOWNSEND.

In an action for a malicious prosecution, in preferring a criminal complaint against the plaintiff, evidence that a recognizance had been taken from the plaintiff, and that an indorsement had subsequently been made upon the affidavits taken by the police magistrate, in these words, "Bail discharged, April 20th, 1843," and that an entry to the same effect was made in the book of minutes kept by the clerk of the criminal court, is not sufficient proof that there was an end of the criminal prosecution, before the commencement of the suit.

THIS was an action for a malicious prosecution in making a criminal complaint against the plaintiff, for receiving stolen property. The declaration set forth the complaint made before a police justice; the arrest of the plaintiff; the giving of a recognizance, with sureties, for his appearance at the next court of general sessions to answer to an indictment to be preferred

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against him for the said offense; the defendant's neglect to prefer any complaint before the grand jury; that on the 20th of April, 1843, the plaintiff was duly discharged from the said recognizance, and fully acquitted and discharged of the said supposed offense; that the defendant had not further prosecuted his said complaint, but had deserted and abandoned the same, and that the said complaint and prosecution were wholly ended and determined. Plea, the general issue. On the trial, before Edmonds, circuit judge, the plaintiff, for the purpose of showing that the criminal prosecution against him was at an end, produced Alfred Phillips, as a witness, who testified that from December, 1841, to 1843, he was a clerk in the office of the district attorney; that he was now a deputy clerk in the office of the clerk of the court of general sessions. Being shown the original affidavits and the examination of Bacon already in evidence, he said they were indorsed in the handwriting of the clerk of the court of general sessions aforesaid, in these words: "Bail discharged April 20, 1843." And there was an entry to the same effect in the book of minutes kept by the clerk of the sessions. At the close of the plaintiff's testimony, the circuit judge nonsuited the plaintiff, on the ground that the suit or proceeding in the criminal court was not at an end when this suit was commenced. The plaintiff moved for a new trial.

H. Dresser, for the plaintiff.

G. R. J. Bowdoin, for the defendant.

By the Court, EDWARDS, J. The reason assigned by the circuit judge, for the nonsuit granted by him, was, that the prosecution was not at an end. It appears by the testimony, that a recognizance was given, conditioned generally for the appearance of the plaintiff in this suit at the then next court of general sessions of the peace for the city and county of New-York. This recognizance contained no reference to any particular charge which had been made against the plaintiff; and there is nothing, except the names of the parties, mentioned in

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it, which could authorize the inference that it referred to the offense for which the plaintiff is alledged to have been maliciously prosecuted. It further appears by the testimony of a deputy clerk of the court of general sessions, that there was an indorsement upon the affidavits taken by the police magistrate before whom the complaint had been made, in these words: "Bail discharged, April 20th, 1843." It is contended on the part of the plaintiff that this was sufficient proof that there was an end of the prosecution, before the commencement of this suit.

In the case of *Morgan v. Hughes*, (2 T. R. 225,) the plaintiff alledged in his declaration that the defendant had maliciously and without probable cause, made a charge of felony against him, before a justice of the peace, who had issued a warrant, under which the plaintiff had been arrested, and compelled to undergo a long imprisonment, until a certain period mentioned, *when he was released and discharged from his said imprisonment*. To this declaration there was a special demurrer, and one of the causes assigned was that it did not appear by the declaration that the plaintiff had been tried or acquitted, or by due course of law discharged from the supposed felony and charge. Justice Buller, in giving his opinion, says, that "stating that the plaintiff was *discharged* is not sufficient; it is not equal to the word *acquitted*, which has a definite meaning. When the word *acquitted* is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways in which a man may be discharged from his imprisonment, without putting an end to the suit." "If indeed," he further says, "it had been alledged that the plaintiff had been discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution."

So in this case; the discharge of the security given for the plaintiff's appearance, which is in all respects analogous to his discharge from imprisonment, did not show that there was an end of the suit. The bail might have been discharged by a surrender of their principal. And their discharge without such surrender, would not have prevented the grand jury from find-

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ing a bill at any time before the offense became barred by the statute of limitations.

Nothing appears from which it can be said that the prosecution was at an end; and the circuit judge was right in granting a nonsuit.

The motion for a new trial must be denied with costs.

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SAME TERM. *Before the same Justices.*

VERMILYA vs. BEATTY, executrix of White.

In a suit brought against the defendant as executrix, she pleaded in bar, *ne uques executrix*; the plaintiff replied that the defendant had been, and was, executrix, and that she had administered divers goods and chattels of the deceased, as such executrix, "*to wit: at M. in the state of F.*" that is to say, at the city and in the county of New York." *Held*, on demurrer, that the replication was bad; and that the defendant could not be sued in a court of law in this state, by reason of her being a foreign executrix, or by reason of her having administered, in another state, any of the goods and chattels of the deceased. It is a general rule of pleading, that if the matters alledged are local in their nature, the truth of the venue is material and of the substance of the issue. And if in such a case, it appears upon the face of the pleading that the venue is untrue, it is a defect which may be taken advantage of by demurrer.

DEMURRER to replication. The facts are recited in the opinion of the court.

A. S. Garr, for the plaintiff.

G. M. Udden, for the defendant.

By the Court, EDWARDS, J. This suit is brought against the defendant as executrix of the last will and testament of Joseph M. White, deceased; and she is so described in the declaration. The defendant sets up as a plea in bar, that she never was such executrix, and that she never administered

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any of the goods and chattels of the deceased, as his executrix. To this plea the plaintiff replies that at the time of the commencement of this suit the defendant was, and from thence hitherto has been, and still is executrix, and that she has administered divers goods and chattels of the deceased as such executrix, *to wit, at Monticello in the state, late territory of Florida*, that is to say at the city and in the county of New-York. The defendant demurs to this replication, and alledges as a cause of demurrer, that the defendant can not be impleaded or sued here, by reason of her being a foreign executrix of the last will and testament of the deceased, or by reason of her having administered out of this state, any of the goods and chattels which were of the deceased at the time of his death.

The first ground which is taken by the counsel for the plaintiff in support of his replication is, that it does not contain the averment that the defendant was and now is a foreign executrix. In this view, we think that he is mistaken. The defendant's plea is general, and alledges that she never was executrix, &c. The replication states that at the time of the commencement of this suit she was, and that she now is, executrix, &c. *to wit, in the state of Florida*. If this allegation was intended as the statement of a place by way of venue, the replication is clearly demurrable. The laying the venue of the matters or facts alledged, is done only for the purpose of fixing their locality, in order to bring them within the jurisdiction of the court in which the suit is brought. Here, however, the place alledged is out of the jurisdiction of this court; which would be a fatal defect. If, on the other hand, the allegation was intended as the statement of the place where the defendant was made executrix, as it undoubtedly was; and if, as we shall assume for the present, a foreign executrix can not be sued in this state, the replication is equally defective; and it is not helped by the subsequent words by which the venue is laid within the city and county of New-York. For, as the matters alledged are local in their character, and as they occurred within a foreign jurisdiction, the venue can not be laid here. It is a general rule of pleading that if the matters alledged are local in their nature,

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the truth of the venue is material, and of the substance of the issue. (*Steph. Pl.* 288.) And if in such a case it appears upon the face of the pleading that the venue is untrue, it is a defect which may be taken advantage of by demurrer. (*Rightmyer v. Raymond*, 12 *Wend.* 51; *Morgan v. Lyon*, *Id.* 265.)

But it is contended on the part of the plaintiff that, even if the defendant is a foreign executrix, she can be sued in this state.

Judge Story lays down the general rule, that no suit can be brought or maintained by an executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other country except that from which he derives his authority to act in virtue of the probate, and letters testamentary or the letters of administration there granted to him. And he cites several English and American authorities in support of the rule as laid down. (*Story's Conflict of Laws*, § 513. *Bond v. Graham*, 1 *Hare's R.* 482. *Vaughan v. Northrop*, 15 *Pet.* 1. *Prine v. Derihurst*, 4 *Mylne & Craig*, 76, 80.) But it is contended on the part of the plaintiff, that there are two decisions in this state, which establish a different principle. In the case of *Campbell v. Tousey*, (7 *Coven*, 64,) the defendant, who was sued as executor, had taken out letters testamentary in the state of Pennsylvania, and had brought assets belonging to the estate of the testator into this state. One of the pleas put in by him was *ne unques executor*. To this plea there was a replication that the defendant was executor. The court held that he was liable for the assets which he was shown to have in his possession in this state, as an executor *de son tort*. It will be observed that he was held liable here not as a foreign executor, but as an executor in this state; not, it is true, by virtue of letters testamentary granted here, but by reason of his acts in this state; that is, by assuming the right to control the assets of the testator in this state as executor; or, as it is expressed in the decision, he became liable as an executor *de son tort*—an office which no longer exists here.

In the case of *McNamara v. Dwyer*, (7 *Paige*, 239,) the defendant had been appointed administrator in Ireland, and

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had possessed himself of a large estate of the decedent, which he had converted into money, and brought into this state. The chancellor held that a court of equity here had jurisdiction to compel him to account for such funds. Whether this decision was in contravention of previous adjudications, as Judge Story seems to consider it, (*Story's Conf. of Laws*, p. 413, note 7,) it is not necessary to inquire. It is sufficient, as far as the case before us is concerned, that it does not sustain the principle contended for by the plaintiff. The chancellor in giving his opinion regards the administrator having assets in his hands unadministered, as a trustee for the creditors and next of kin of the decedent. And although he lays down the rule that in such a case the foreign administrator can be called to account in this state, he adds, that he has some doubt whether he ought to be called to account therefor in a court of law.

In the case before us it is not alledged that the defendant has ever been in possession of any of the assets of the testator within this state; and even if it had been so alledged, she could not be made liable in a court of law.

The defendant is entitled to judgment, with leave to the plaintiff to amend on the usual terms.

SAME TERM. *Before the same Justices.*

ARMSTRONG and others vs. TUFFTS and others.

Where a suit is brought upon a consideration for which promissory notes have subsequently been taken, it is sufficient for the plaintiff to surrender, or offer to surrender, the notes, on the trial, to be cancelled. They need not be surrendered previous to bringing an action against the makers.

In an action on the case for deceiving and defrauding the plaintiff, by obtaining property from him without paying for it, under pretence of a purchase, and upon false representations as to the solvency of the purchasers, it is proper to submit it to the jury to determine, upon the evidence, whether the representa-

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tions alledged were made, and whether, if made, they were false, and if false, whether they were made with intent to defraud and deceive the plaintiff. . . Such a charge is equivalent to a direction that it is necessary there should have been a *scienter*.

THIS was an action on the case, tried before EDMONDS, circuit judge, at the New-York circuit in December, 1846. The declaration contained three counts. The first count alledged that the defendants conspired together to obtain a boat-load of oats belonging to the plaintiffs, without paying for them, and, under pretence of a purchase, fraudulently, and with intent to cheat the plaintiffs, in pursuance of said conspiracy, applied to Alvah Wheaton, the agent of the plaintiffs, to purchase said oats in the name of David D. Van Alstyne & Co. and represented that they were good and solvent, and would pay the money for said oats on delivery; that said agent delivered said oats, but that Van Alstyne & Co. were not solvent; that on the contrary, Van Alstyne was insolvent, and had no copartner who was solvent, which was well known to the defendants, and neither said David D. Van Alstyne, or David D. Van Alstyne & Co. or any other person paid for said oats; whereby the plaintiffs lost the same. The second count was substantially the same, except that it contained no allegation of a conspiracy. The third count was in trover for said load of oats. The plea was not guilty. Wheaton, the plaintiffs' agent, from whom the oats were obtained, testified on the trial, that failing to obtain the pay for the oats, from the defendants, he accepted two notes drawn by Van Alstyne & Co., one of which was payable to the witness' order, and the other to the order of Van Alstyne & Co. and indorsed in blank by them. The defendant Tufts, it appeared, was a grain broker. The two promissory notes were read in evidence, by the counsel for the plaintiffs; who offered the same to be cancelled or surrendered to Van Alstyne. The plaintiffs having rested their case, the counsel for the defendants moved for a nonsuit, upon the ground that the promissory notes should have been surrendered or cancelled, or offered to be surrendered or cancelled, before the commencement of the suit. And he insisted that while they remained

my term. Jones, Edmonds

SAME TERM. *Before the same Justices.*

KELSEY vs. GRISWOLD.

Edmonds
JJ.

Where there has been no actual conversion of property, a demand and refusal can not lay a foundation for the action of trover; unless at the time of the refusal the party has the property demanded in his possession, so that he can comply with the demand.

Where a person lawfully coming into the possession of the property of another has parted with the same, previous to the making of a demand by the owner, the remedy of the owner, against such person, is not by an action of trover, but by a special action on the case, or in assumpsit.

The statute of limitations begins to run against an action of trover, from the time of the conversion.

Promissory notes, for which an action of trover was brought, were delivered to the defendant as collateral security for an advance of exchange, on the 9th of March, 1837. On the 23d of August, 1838, after he had been repaid that advance, but while he still had the notes in his hands, a demand was made upon him, and he refused to deliver them up. *Held* that under the circumstances, this was a conversion, and that an action of trover must be brought within six years from the time of such conversion.

Held also, that after the statute of limitations has commenced running against such an action, by a demand and refusal, the case will not be taken out of the statute by a second demand and refusal made within six years, but after the defendant has parted with the property.

MOTION to set aside report of referee. This was an action of trover. The declaration stated that on the first day of December, 1844, the plaintiff was possessed of three certain promissory notes, one of which was made by Donner & Co., dated 15th April, 1837, for \$375,82 payable fifteen months after date, to the order of B. F. Lee & Co., another of which said notes was made by Donner & Co., dated 15th April, 1837, for \$375,82, payable twenty-one months after date, to the order of B. F. Lee & Co., and the other of which said notes was made by William Cronkhite, dated 7th September, 1837, for \$545,28, payable twelve months after date, to the order of B. F. Lee & Co. That the said three notes were severally duly indorsed by the said B. F. Lee & Co.; that the said plaintiff casually lost said three notes on the said 1st December, 1844, and that on the twenty-

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fifth December, 1844, the said three notes came to the possession of the said defendant by finding. That the said defendant had not delivered said notes to the plaintiff, although often requested so to do, and that on the 26th December, 1844, he converted the same to his own use. The pleas were the general issue and statute of limitations. The cause, by the consent of the attorneys for the respective parties, was referred by rule of court to Daniel B. Tallmadge, Esq., as sole referee therein. Upon the hearing of the cause before the referee, the following statement of facts was agreed upon between the parties.

On the 9th day of March, 1837, Benjamin F. Lee, James P. Cronkhite and Henry Weston, composing the firm of B. F. Lee & Co., purchased of George Griswold, direct or through Shipman, Corning & Co., £3000 sterling of exchange at 14½ per cent, 90 days and 7 per cent interest, amounting to \$15,508.80. In payment of this exchange, B. F. Lee & Co. gave their notes to George Griswold, as follows, viz: One note due the 29th of May, 1837, another due on the 8th of June, 1837, and another due on the 18th of the same month, for \$5169.60 each. To secure the payment of these notes, on or about the 9th of March, 1837, B. F. Lee & Co. gave George Griswold sundry notes as collateral, and among others the notes in question in this suit. As the collaterals fell due and were paid, or any payment made on them, the money was applied to the payment of B. F. Lee & Co.'s notes so given to Griswold, and new notes were given by B. F. Lee & Co. for the balances due, after applying the cash so received from the collateral notes, and the last of the notes given to George Griswold by B. F. Lee & Co. for such balances, fell due on 23d August, 1838, viz: One note for \$208.06, and another one for \$1716. On the 23d of August, 1838, Griswold had in cash in his hands, received from the collateral notes, \$2092.26, being \$168.20 more than B. F. Lee & Co. owed him for the exchange so bought as aforesaid. There were, also, remaining in the hands of Griswold on the 23d of August, 1838, sundry notes of the collaterals, surplus, after paying him in full, and among them were the three notes in question; and B. F. Lee & Co. then, on the 23d day of August, 1838, demanded of Griswold

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all the notes deposited with said Griswold as collateral for the payment of the notes of B. F. Lee & Co., given for exchange aforesaid and among others demanded the three notes in question, which said collateral notes Griswold refused to deliver to B. F. Lee & Co., claiming that he the said Griswold had a lien on them for the amount of the indebtedness to him of B. F. Lee & Co., on two several promissory notes then and still held and owned by said Griswold, one of which notes was for the sum of \$232,15, dated March 30th, 1838, and due the 17th of May, 1838, and the other was for the sum of \$2095,32, dated March 30th, 1838, and due June 1st, 1838, of which said notes B. F. Lee & Co. were the makers, and the same were indorsed by Shipman, Corning & Co., who passed them, or the originals, of which they were part renewals, to said Griswold, on or about the 19th day of April, 1837, for exchange purchased of said Griswold by Shipman, Corning & Co. The original note passed by said Shipman, Corning & Co., to Griswold, was for the sum of \$3101,52, which became due the 22d of June, 1837, when a partial payment was made by B. F. Lee & Co. to said Griswold, and a new note was given for the balance, and such partial payments and renewals were continued down to the 30th of March, 1838, during all which time said Griswold was the holder and owner of the notes. On the 30th March, 1838, instead of a partial payment being made, a short note was given by B. F. Lee & Co., payable to the order of Shipman, Corning & Co. for \$232,15, which note B. F. Lee & Co. promised to pay at maturity, and at the same time of giving the above note, they gave another for \$2095,32 at sixty days, that being the usual time of the renewals to be given. Said two notes being equal in amount to a note of B. F. Lee & Co., which became due on or about the 30th of March, 1838, of which they were the renewals. Both of said notes were protested when they became due, and have remained unpaid in the hands of George Griswold to the present time, and said Griswold claimed that the collaterals in his hands should be applied to the payment of the two said notes of B. F. Lee & Co. The two notes of Donner & Co. were paid to Griswold at the time of their maturity, and the

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note of Cronkhite was of no value, but was cancelled on payment by his father of \$75, shortly after it became due, which sums being the amount received upon the three notes in controversy, were passed to the credit of B. F. Lee & Co., and a large balance still remained due from B. F. Lee & Co. to George Griswold. Two of the members of the firm of B. F. Lee & Co., viz. Benjamin F. Lee and James P. Cronkhite each filed their separate petitions for a discharge under the late United States bankrupt law, and B. F. Lee was, on his own petition, on the fourth day of March, 1842, declared a bankrupt, and received his discharge on the first day of July, 1842, and said James P. Cronkhite was on his own petition, declared a bankrupt on the 20th of May, 1842, and received his discharge on the 20th of December, 1842, and Henry Weston, the other member of the firm was declared a bankrupt in the state of Indiana, on the first day of July, 1842, and in the same year was duly discharged. The notes in question were inventoried in their schedule in bankruptcy, by Lee & Cronkhite, as the property of B. F. Lee & Co., and the general assignee in bankruptcy for the southern district of New-York, on the 20th of December, 1842, sold at public auction to Humphrey B. Dunham, all Benjamin F. Lee's and James P. Cronkhite's interest in thirty-three notes, including the three notes in question, amounting in the aggregate to the sum of \$25,000 for the sum of \$93,50, that the interest of Lee & Cronkhite in the thirty-three notes was sold separately, but the interest of each in all the thirty-three notes was sold at one time, at one bidding. The interest of B. F. Lee in the thirty-three notes was sold for \$50, and the interest of Cronkhite for \$42,50. Their interest in each note was not sold separately, but the interest of each in the whole 33 notes was sold at one time. The notes were sold in a lump. On the 8th of March, 1843, Humphrey B. Dunham sold the same to John B. Coles, jr., and on the fourth of April, 1843, Coles sold the same to George H. Kelsey, the plaintiff. Benjamin F. Lee, Henry Weston and James P. Cronkhite were general co-partners in trade, entitled to the profits and bearing the losses of the business proportionally. B. F. Lee furnished all

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the capital, and no profits were made and the firm was largely insolvent. On the 26th of December, 1844, the plaintiff sent a written demand of the notes to the defendant, which demand the defendant refused, saying that the matter was in the hands of Joseph W. Allsop.

The referee reported in favor of the defendant.

E. Coles, for the plaintiff.

M. S. Bidwell, for the defendant.

By the Court, EDMONDS, J. The statute of limitations begins to run from the time the cause of action accrues. (2 R. S. 224, § 18.) In trover the cause of action accrues upon the conversion. The *trouver* or finding is immaterial. It is the conversion which is the gist of the action. A conversion is the wrongful assumption of property in, or right of disposing of, goods, such as discounting a lost bill after notice; (4 Taunt. 799;) or taking the property of another by assignment from one who had no authority to dispose of it; (6 East, 538;) or denying goods to him who has a right to demand them. (6 Mod. 212.) The action being founded on a conjunct right of property and possession, any act which denies or is inconsistent with such right is a conversion. (*Bristol v. Burt*, 7 John. 254.) In such case a demand and refusal are unnecessary. They are necessary only when the wrongdoer became in the first instance lawfully possessed of the goods, and there is no proof of an actual distinct conversion. (2 Saund. 47, e.)

Demand and refusal are never of themselves a conversion, except perhaps where the wrongdoer has the property actually in his possession at the time. They are merely evidence of a conversion; not indeed the only evidence; for an actual conversion may still be proved. But in the absence of such proof, they are evidence enough to entitle the party to recover. (*Baldwin v. Cole*, 6 Mod. 202. *McCombie v. Davis*, 6 East, 538. *Hoare v. Parker*, 2 T. R. 376.)

This rests upon this principle—that if the wrongdoer has sold

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or disposed of the property such sale is the conversion, and that may be evidenced either by proof of the sale or by proof of demand and refusal; but where he still retains the property in his possession *non constat*, he may retain it for the rightful owner. But when, on demand, he refuses to deliver to such owner, he at that moment assumes to exercise the right of property in himself, and thus converts it to his own use.

Hence in the action of trover, when the inquiry is at what time the statute of limitation begins to run, reference is had to the time of the conversion, and never to the time of a demand and refusal; unless such refusal be of itself a conversion, or the demand and refusal is the only evidence. In the latter case, the time of the demand and refusal is the criterion, simply because there is no other evidence of a conversion, and no other means of ascertaining when a conversion did take place.

In conformity with these principles the authorities are, that the statute begins to run at the time of the conversion. (2 *Cowen's Tr.* 208, citing 7 *Mod.* 99.) *Read v. Markle*, (3 *John.* 523,) was where property was seized on an execution which was afterwards set aside. The court held that the statute began to run from the time of the seizure, because the execution was void. In *Granger v. George*, (5 *Barn. & Cress.* 149,) the action was trover for a box of papers placed in the defendant's custody in 1816, and as he had come rightfully into the possession of them, unless there was proof of an actual conversion, a demand and refusal was necessary. Accordingly, in 1824, they were demanded of him, but on proof being given that in 1818, more than six years before suit brought, he had disposed of them by delivering them over to certain other persons, the plea of the statute was held to be a good bar, notwithstanding the proof that the plaintiff did not know of the conversion in 1818 until his demand in 1824; *Abbott, C. J.* holding, in terms, that the act began to run from the time of the act done by the defendant; and *Bayley, J.* remarking that the goods having been out of the defendant's possession more than six years before suit brought, it was manifest that he could not have converted them within that period. (See also *Lovell v. Martin*, 4

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Taunt. 799; *Woodsworth v. Harley*, 1 B. & Ad. 391; 1 Chit. Pl. 9th Am. ed. 499, n. k.; *Ball. on Lim.* 97; *Horesfield v. Cort*, *Addis. Rep.* 152; *White v. Edgman*, 1 Tenn. R. 19.)

Testing the case under consideration by these principles, it is manifest that the cause of action was barred by the statute. The notes for which the suit was brought were delivered to the defendant as collateral security for an advance of exchange on the 9th of March, 1837. On the 23d of August, 1838, he had been repaid that advance, but he still had these notes in his hands. At that time a demand was made upon him, and he refused to deliver them up. That was, under the circumstances, a conversion—not merely evidence of it—but an absolute conversion of them to his own use. This suit was commenced February 1, 1845, nearly seven years afterwards.

But again; the two notes against Donner were collected by the defendant at the time they became due, that is 15 to 18 January, 1839, and the note against Cronkhite was compromised and given up by the defendant about the time it became due, that is, in September, 1838. At these times, it was that the defendant made an absolute disposition of the notes, and from that time they were no longer in his possession. These events also occurred more than six years before the commencement of the suit.

Now if the defendant had authority to collect the notes, he can not be sued in trover for them, but must be sued for money had and received; for he has done nothing with them which he was not authorized to do. (*Palmer v. Jarmain*, 2 M. & W. 282. *Stierneld v. Holden*, 4 B. & C. 5; S. C. 6 D. & R. 17.) But if his authority to collect them had expired by reason of the payment of the debt for which they had been pledged, and he still received the money upon them and gave them up, that was a conversion of them. (*Alsager v. Close*, 10 M. & W. 576. *Atkins v. Owen*, 4 A. & E. 819; S. C. 6 N. & M. 309.) So that whether the conversion was constituted by the demand and refusal while the defendant had the notes in his possession and could give them up, or by his unauthorized collection of them, in either event the cause of action accrued

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more than six years before suit brought and is barred by the statute.

It is insisted, however, for the plaintiff, that the cause of action accrued at the time of the second demand and refusal in December, 1844. To this claim it seems to me there are several insuperable objections.

1. If the plaintiff is right, then is the statute of limitations virtually repealed, so far as the action of trover is concerned. For no matter though the cause of action had accrued more than six years back, either by actual conversion or by a demand and refusal, the statute would begin to run from a second demand; and if a second demand and refusal have this power of taking a case out of the statute, a third and fourth must have the same power, and so on until the party shall choose to let six years elapse between any two of the numerous demands he may please to make.

2. The second objection is that where a party, at the time of his refusal, has it not in his power to deliver up the goods demanded, the refusal is no evidence of conversion. Thus where he has deposited the paper demanded with his attorney, who has a lien upon it, (*Smith v. Young*, 1 *Camp.* 439,) or a carrier or a wharfinger has lost the goods, (*Anon.* 2 *Salk.* 655; *Ross v. Johnson*, 5 *Burr.* 2825; *Severin v. Keppell*, 4 *Esp.* 157; *Dewall v. Moxon*, 1 *Taunt.* 391;) or he has previously parted with them by sale, (*Edwards v. Hooper*, 11 *M. & W.* 363;) or where the property, left at livery, had been seized on attachment and was at the time in the custody of the law, (*Verrall v. Robinson*, 2 *C. M. & R.* 495.)

From these cases it would seem that the action of trover will not lie unless the act of parting with the possession shall have laid a proper foundation for it. Or, in other words, if there has been no actual conversion, that no demand and refusal can lay a foundation for the action of trover, unless the party has the property demanded in his possession, at the time of the refusal, so that he can comply with the demand; and the party aggrieved must resort to his remedy by a special action on the case, or in *assumpsit*, as the case may be.

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And this may be so ; for otherwise a party might be made liable in trover when he had never been guilty of a conversion, and that which would otherwise be an action of assumpsit might be converted into a tort, at the pleasure of the claimant, and without any fault on the part of the other party, and without his having it in his power, by any act he could perform, to screen himself from the action.

These considerations are eminently applicable to the case before us. For if the defendant had a right to collect these notes, the action of assumpsit, in which he might be liable to his original debtor and in which he might set off his demands, could at the pleasure of the present plaintiff, be converted into a tort and the defendant thus be deprived of his set-off. If he had no right to collect them, and yet did so, long ago, and while the notes in fact belonged to his debtor, who by his long silence may well be considered as having acquiesced in that mode of paying his debt, an act which the statute of limitations barred before the plaintiff had any interest in the matter, may be revived at the plaintiff's pleasure, and the statute of repose thus be avoided after it had actually attached.

I have confined my examination to only one of the points raised before the referee, because I have regarded it as decisive of the case. If I were to go any farther I might be met by a doubt whether the plaintiff did in fact acquire any title to these notes which would enable him to sue in his own name, and whether the third partner of the firm of Lee & Co. whose interest he did not acquire, was not a necessary party ; and the farther doubt whether an action of tort passed to the assignee in bankruptcy in such manner as to authorize him to convey it to this plaintiff. I do not, however, attempt to solve these doubts ; as the case must be disposed of on the other point, which I have considered at large.

The motion to set aside the report of the referee must be denied with costs.

SAME TERM. *Before the same Justices.*

SPEAR and RIPLEY vs. MYERS.

In an action of *assumpsit* the declaration contained only the money counts, with a copy of a promissory note annexed, signed by B. and payable to the order of the defendant, and indorsed by him and one K., and a notice that the note was the only cause of action, and that such notice was a bill of particulars of the plaintiff's claim; *Held*, that the note might be given in evidence under the money counts, and that the bill of particulars did not confine the action to the claim on the note.

As between the indorsee and indorser, a note may be given in evidence under the *indebitatus assumpsit*; on the principle that there is a privity of contract between them, created by the statute making notes negotiable.

Parties who receive a note which has been improperly put in circulation, in payment of an existing debt, without parting with any value for it, at the time, or surrendering any securities, are not entitled to hold it, as against the rightful owner.

It is in the discretion of a judge, or referee, to determine when testimony respecting the character of witnesses shall cease, when it may be resumed, and, under some circumstances, which party shall close the examination. And the court will not interfere with the exercise of that discretion, unless it has been abused.

MOTION, by the defendant, to set aside the report of a referee. The facts are sufficiently stated in the opinion of the court.

S. P. Nash, for the plaintiffs.

Cochran & Rathbun, for the defendant.

By the Court, EDMONDS, J. This is a motion to set aside the report of a referee. The action was *assumpsit*. The declaration contained only the money counts, with a copy of a promissory note annexed, signed by William Baker, and payable to the order of the defendant, and indorsed by him and by one Knapp, and a notice that the note was the only cause of action, and that that was a bill of particulars of the plaintiff's claim. The first objection made to the plaintiffs' recovery is

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that the note could not properly be given in evidence under this declaration.

This mode of pleading was doubtless adopted under section 17 of chap. 386 of laws of 1840, which enacts that in actions on contract upon any written instrument, if the plaintiff shall describe the instrument in his declaration, or annex thereto a copy thereof, unless the defendant shall verify his plea and annex thereto an affidavit of merits, the plea may be disregarded; and under rule 92, which prescribes the form of the affidavit, and declares that the rule shall apply only in cases where it shall appear by the declaration, or the plaintiff's bill of particulars, that the written instrument is the only cause of action. A previous statute, (*Laws of 1832, ch. 276,*) authorized the holder of a promissory note, instead of bringing separate suits against makers and indorsers, to include all the parties to the note in one suit, and in such suit to declare on the money counts alone, and when a copy of the note was served with the declaration, to give the note in evidence under those counts. This court has held that this latter statute, and its various provisions, relate only to suits where different parties to a note are sued jointly; that is, not where two or more drawers, or two or more joint indorsers are sued jointly, but where drawers and indorsers, or first and second indorsers, are sued jointly. (1 *Denio*, 105. 4 *Hill*, 35.)

The action here is against one party only, namely the first indorser; and the act of 1832 does not apply to it. The authority to declare on the common counts, and give the note in evidence under them, is to be found elsewhere than in the statute; for the act of 1840 does not give the authority. It merely prescribes what shall be the effect when the note is described in the declaration, or a copy of it annexed thereto.

Now I understand the rule to be that as between the indorsee and an indorser the note may be given in evidence under the *indebitatus assumpsit*; on the principle that there is a privity of contract between them, created by the statute making notes negotiable; for under that statute the first indorser undertakes to pay the note to his immediate indorsee, or to any other party

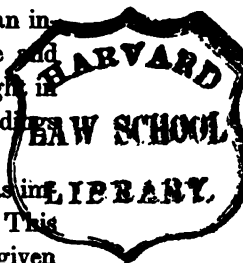
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to whom it may be transferred. (*Onondaga Co. Bank v. Bates*, 3 *Hill*, 53.)

It is however farther insisted that the bill of particulars confines the action to the claim on the note, and necessarily makes the declaration which is in form on the money counts, in fact a count by the second indorsee against the first indorser, and that on such a count evidence of money had and received is inadmissible. This objection, if tenable, would very much enlarge the office of a bill of particulars, which is merely to confine the plaintiff to the cause of action, and the amount specified in the particulars, and not to change the form of the count. The bill of particulars is regarded as incorporated into, and forming part of, the declaration. Hence, in this case its office was to apprise the defendant that under the money counts the plaintiff would seek to recover the amount due on that note, and nothing more; and it would be quite beyond its province to inform the defendant that it had changed the count from a general one on an indebitatus assumpsit, to a special one as between indorsee and indorser. The ruling on the reference was therefore right, in allowing the note to be received in evidence under the pleadings in this case.

The next objection to a recovery is that the note was not properly put in circulation by Knapp the second indorser. This may have been the case; for the evidence is that it was given to him to see if he could buy goods with it for the maker, and instead of that he paid it away on a debt owing by himself to these plaintiffs. To that it is answered that the plaintiffs were bona fide holders without notice and for a valuable consideration, and were therefore not affected by this misappropriation.

The cases of *The Bank of Salina v. Babcock*, (21 *Wend.* 500,) *Bank of St. Albans, v. Gilliland*, (23 *Id.* 312,) and *Bank of Sandusky v. Scoville*, (24 *Id.* 115,) and the case of *Swift v. Tyson*, (16 *Peters*, 1,) had a tendency to throw some doubts upon the case of *Coddington & Bay*, (20 *John.* 637,) where it had been settled that though a bona fide holder of negotiable paper, who has received it for a valuable consideration without notice of, or reason to suspect, a defect in the title of the person



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from whom it was taken in the usual course of business, is entitled to full protection, yet that where he has received it for an antecedent debt, either as a nominal payment, or as a security for payment, without giving up any security for such debt which he previously had, or paying any money, or giving any new consideration, he is not a holder for a valuable consideration, so as to give him a right to detain it from its lawful owner. These doubts caused the courts to review the question; and in *Stalker v. McDonald*, (6 Hill, 93,) it was again fully considered, and the doctrine which had been asserted in *Bay & Coddington*, and had been followed among us for more than twenty years, was reasserted and established as the law in this state. In conformity with that decision have been the subsequent rulings in this court.

In *White v. Springfield Bank*, (1 Barb. Sup. Court Rep. 225,) all the consideration paid was the delivery up of an unaccepted draft of the person transferring the note in question to the defendants, and which the defendants had discounted. The court held that the situation of the parties had in no respect been changed, and that as the note had been received in payment of a precedent debt, and for no other consideration, the defendants were not holders for a valuable consideration, and entitled to detain the note from the rightful owners. In *Stewart v. Small*, (2 Barb. Sup. Court Rep. 559,) the defendants had received the note in question from their debtor without notice, in payment of his indebtedness, and had credited him the amount upon their books and upon a draft of their debtor's for a larger amount, which he had drawn upon them and which they had accepted and paid for him. The defendants were, in that case, also held not to be bona fide holders for a valuable consideration, and entitled to protection against the rightful owner.

The case under consideration is of the same character. The plaintiffs were creditors of Knapp, from whom they received the note now in suit. They received this note, and two others, in payment of their debt, gave Knapp a receipt for them, and balanced the account on their books. But they parted with no

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value for it; they gave no money or goods for it. They surrendered no securities. They simply received it in payment of a simple contract debt, and are not entitled to hold it against the rightful owner. The referee, therefore, erred in ruling that "the plaintiffs having taken the note in payment and satisfaction of an account against Knapp, are bona fide holders for a valuable consideration," and his report must be set aside.

Other objections are however made to the report, which it may be well to consider. One is that the plaintiffs were allowed to prove by Knapp's clerk that the notes which Knapp gave the plaintiffs were credited in Knapp's books to Baker, and that without producing Knapp's books. It is unnecessary for us to stop and inquire whether this was proper; because the fact sought to be proved was quite immaterial to the matter in issue, and may therefore be overlooked by us on this motion. It is doubtless proper, on a trial before a referee, that a party should make his objections in due time, and interpose his exceptions to the ruling of the referee, as thereby the attention of both that officer and of the opposite party may thus be called to the point in time to allow the party to withdraw his obnoxious claim and the referee to amend his ruling or make it clearer, in case he shall think it proper. But it by no means follows from thence that the mode of reviewing such rulings is as it were on a bill of exceptions where the court may be bound by the strict rule of granting a new trial where there is any error, however immaterial that error may be to the result. The mode of review is rather in the nature of a motion for a new trial on a case, where the court may not only look at the ruling, as to its fitness per se, but as to its effect on the result, and disregard it if not pertinent or material to that result. It is in this view of the proceeding before us that I have remarked that it was unnecessary to inquire whether the referee erred in admitting parol evidence of the contents of Knapp's books. For it was quite impertinent to the issue on trial, what Knapp may have done on his books in his desire to conceal his alledged breach of trust towards the Bakers.

The next objection taken is that the witnesses, the Bakers
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and Malburn, having been examined by the plaintiffs to new matter not gone into by the defendant, the plaintiffs had no right to impeach them. It is unnecessary here to inquire how far, and under what circumstances, a party may, by making his adversary's witness his own, deprive himself of the right of impeaching them; because it is very evident here that there was no such examination of the defendant's witnesses by the plaintiffs as to make them their own. It is not simply by a cross-examination that a party makes his adversary's witness his own; but that must depend on the nature of that examination, and whether any new defence, not growing out of the direct examination, has been introduced. (*People v. Moore*, 15 *Wend.* 423.)

The next objection is, that after having closed the branch of their case connected with the impeachment of witnesses, the plaintiffs had no right to recur again to impeaching testimony; that the defendant had a right to close on the impeachment, and that the referee erred in refusing to receive testimony offered by the defendant in support of his witnesses. All this is necessarily very much in the discretion of the referee or a judge presiding at the trial, and the court will not interfere with the exercise of that discretion, unless it has been abused. It does not, as is too often supposed, require a large number of witnesses to prove what a man's general character is; and the fact whether it is good or bad by no means depends on the preponderance in numbers on either side. The officer presiding at a trial must therefore necessarily be clothed with authority to say when such a course of inquiry shall cease, when it may be resumed, and under some circumstances, who shall have the right to close the examination.

The plaintiffs introduced five witnesses to impeach the defendant's witnesses, and then rested their case. The defendant did not require the plaintiffs to exhaust their case on this subject; but when the defendant was about proceeding to call his supporting witnesses, on the demand of the plaintiffs the defendant was required by the referee to exhaust his case on that topic. Several adjournments were granted him for that purpose, and

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he seems to have been allowed to examine as many as he pleased, without any restriction as to the number. How many he examined the case does not state; but after he closed, the plaintiffs were allowed to examine three more on the subject, and then the referee refused to let the examination proceed any farther. Which party had the greatest number does not appear, and I can not discover in this any improper exercise of the discretion vested in the referee. And as to the right to close on this topic, the defendant might have secured that to himself by a demand on his part that the plaintiffs should close on theirs. This he omitted to do, notwithstanding the hint which he received from the plaintiffs' action in this respect. It is too late for him now to object.

But it is unnecessary to dwell upon the point; because in the view which I have taken of this case in other respects it is quite immaterial whether the defendant's witnesses were worthy of credit or not. For the erroneous ruling to which I have referred, the report must, at all events, be set aside.

Report set aside.

SCHENECTADY GENERAL TERM, May, 1849. *Paige, Willard, and Hand*, Justices.

DORLON vs. DOUGLASS.

When a party relies upon the confessions of his adversary, for matter of charge, the latter is entitled to all that was said, at the same time, on the same subject, by way of discharge.

The court and jury may give credit to what *charges* the party, and disbelieve matter said at the same time, in avoidance, if the latter is improbable in itself, or is shaken by the other proofs in the cause.

If the matter of avoidance relates to another subject, not inquired about by the examining party, although relevant to the matter in issue, it is not admissible.

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THIS was an action of trover for a promissory note for \$375, made by John Ives, payable to the order of Isaac Wilson, three months from date, with interest, at the Washington County Bank, and dated Hebron, March 2, 1847. It was indorsed successively by 1st, I. Wilson; 2d, H. J. Paine; 3d, J. G. Bacon; 4th, E. Dorlon, (the plaintiff.) The cause was tried under the plea of the general issue, at the Rensselaer circuit, in November, 1847, when the jury found a verdict for the defendant. The cause came before this court on a bill of exceptions taken by the plaintiff to sundry rulings of the judge at the circuit, and to his refusal to charge as requested. The cause turned entirely upon the question whether the plaintiff showed any title to the note, at the time of the alledged conversion by the defendant. In the progress of the trial it appeared that the defendant, as cashier of the Merchants' and Mechanics' Bank in Troy, on the 24th of March, 1847, had discounted a note for one S. M. Bragg for \$300, which purported to be made by Adams, and to be indorsed by Paine, Ferris & Rockwell, E. Dorlon, (the plaintiff,) and S. M. Bragg, which note and indorsements, except Bragg's, was a forgery. On the 9th of April, 1847, Bragg presented at the bank, for discount, in the morning, a note made by himself for \$350, and purporting to be indorsed by J. G. Bacon and E. Dorlon, (the plaintiff,) both which indorsements were forgeries. The bank discounted both these notes and paid the proceeds to Bragg, before discovering that they were forgeries. On the 9th of April, after the last mentioned note was discounted, it was ascertained that both were forgeries, and the defendant was anxious to secure the bank. Bell, the teller of the bank, after dinner on the 9th of April, took the \$350 note and showed to the plaintiff his indorsement, concealing that of Bacon, and asked if it was his, and he said it was. After uncovering the other signature, the plaintiff, on again looking at his own, said it was not his signature. The witness then told him they had discounted the note, and asked him why he said that was his signature. *Dorlon replied that he had indorsed a note for Bragg, and witness thinks he said that morning.* On returning to the bank he found Bragg there trying to get a check for

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\$160 on the Essex County Bank discounted. Bragg was then told that the \$300 and \$350 notes were both forgeries, and he was required to restore the money to the bank or secure them. Bragg said he had disposed of the money. Bell, the teller, asked him "Where is the note Dorlon (the plaintiff) discounted for you?" Bragg took out the note now in question for \$375, and handed it to the cashier and said, "Here it is." After ascertaining that this was a genuine note, and that the maker was a man of undoubted pecuniary responsibility, the defendant said to Bragg that he would pin it to the \$350 forged note as collateral security. Bragg said "Well." The cashier pinned them together accordingly. From the testimony of the plaintiff's witness it was shown that in this same interview, *the plaintiff said in the presence of the defendant and Bragg, that the \$375 note belonged to him, the plaintiff, and no reply was made to this.* It appeared also, that Bragg left the \$375 note and check on the Essex County Bank with Douglass, on the 9th of April, with an assurance that on the next day he would call and redeem all the forged paper. He did not call, but was on the 10th of April committed to jail for forgery by a magistrate, on the complaint of the plaintiff. While in jail, on the 15th of April, he drew an order on the defendant, as cashier of the Merchants' and Mechanics' Bank, requiring him to deliver to J. G. Bacon the \$375 note in question, describing it as being left by him with the cashier on the 9th of April as security for the \$350 note, upon his paying the amount of the said \$350 note, and the cashier delivered it up accordingly. Having thus obtained possession of the \$375 note, Mr. Bacon struck out his own indorsement thereon, and claimed to hold the note as security for the money he advanced.

The defendant then proved by Robinson, the attorney for the Merchants' and Mechanics' Bank, that the \$300 forged note was put into his hands for collection, by the bank; that he called on the plaintiff for payment, and the plaintiff told him *that his name indorsed on said note was not his signature.* This was objected to by the plaintiff's counsel, as immaterial and irrelevant, but admitted by the court, and the plaintiff's

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counsel excepted. On his cross-examination the witness stated that he never indorsed that note, but that he had admitted to Mr. Douglass that it was his signature, and for that reason he paid it. The plaintiff's counsel then offered to prove by this witness that the plaintiff, in the same conversation, stated to the witness that the defendant Douglass, after discovering Bragg's forgeries, had got Bragg into the bank and got a \$375 note from him which belonged to him, the plaintiff, and that Douglass, the defendant, did not deny that the note belonged to Dorlon, but refused to give it up until he got his pay upon the forged notes. This was objected to by the defendant's counsel, on the ground that they had not called out any conversation in relation to the \$375 note; that the admission of Dorlon which they had proved related to the \$300 note only, and that the plaintiff was entitled to have all that Dorlon said on that subject, but not what he said on any other subject. The objection was sustained by the court and the testimony excluded; to which the plaintiff's counsel excepted.

The judge, in submitting the cause to the jury, after reviewing and commenting on the evidence, left it to them to say whether the plaintiff was the owner of the note or not, and instructed them if they found that the plaintiff was the owner of the note, to find for the plaintiff. Neither party excepted to the charge. The plaintiff's counsel requested the judge to charge that the claim made by the plaintiff *that that note was his, in the presence and hearing of both Douglass and Bragg, and neither of them denying it, was sufficient evidence that the plaintiff was the owner of the note, after Douglass had said that the note had not been discounted.* The judge refused so to charge, and the plaintiff's counsel excepted.

J. Holmes, for the plaintiff.

D. Buel, for the defendant.

By the Court, WILLARD, J. The testimony of Robinson, the attorney of the bank, that the plaintiff told him that his

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name indorsed on the \$300 note was not his signature, tended to show that the plaintiff's admission to Bell, the bank teller, that he had indorsed a note for Bragg on the morning of the 9th of April, related to the note in question. It thus increased the presumption that the note in dispute belonged to Bragg and not to the plaintiff. And if so, the former had a right to dispose of it as he did, and the latter had no right to complain.

The cause, however, on the argument, was narrowed down to the two last exceptions, viz. that to the exclusion of the whole of the plaintiff's conversation, of which the defendant had given evidence only of a part, and that to the refusal to charge as requested. In the *Queen's case*, (2 *Brod. & Bing.* 298,) Lord Tenterden (then Ch. J. Abbott) remarks: "The conversations of a party to the suit, relative to the subject matter of the suit, are in themselves evidence against him in the suit, and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion." This doctrine of Lord Tenterden has been repudiated by the court of queen's bench, in *Prince v. Samo*, (7 *Ad. & Ellis*, 627.) Lord Denman, in delivering the judgment of the court, says that the observations of Lord Tenterden in the *Queen's case* were not called for by the questions proposed by the lords, nor acted upon by them, nor concurred in by all the judges. Indeed several of the judges dissented from them. The doctrine, therefore, rests upon the authority of that learned judge alone. The conclusion to which the court arrived was that a witness who has been cross-examined as to what the plaintiff said in a particular conversation, can not, on that ground, be re-examined as to other

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assertions made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related; although the assertions as to which it is proposed to re-examine be connected with the subject matter of the present suit. The same principle was recognized in the subsequent case of *Sturge v. Buchanan*, (10 Ad. & El. 598,) and seems now to be the settled practice in England.

The same principle was adopted by this court in *Garey v. Nicholson*, (24 Wend. 350,) and repeated in *Kelsey v. Bush*, (2 Hill, 440.) The cases collected in *Cowen & Hill's Notes*, 226 *et seq.*, where it has been ruled that the whole confession or declaration must be taken together, are in affirmance of the same rule. Nothing is clearer, upon principle and authority, than that when a party relies upon the confession of his adversary for matter of charge, the latter is entitled to all that was said at the *same time, on the same subject*, by way of discharge. The court and jury are not bound to give equal weight to all parts of the admissions. They may give credit to what charges the party, and disbelieve matter said at the same time in avoidance, if the latter is improbable in itself, or is shaken by the other proofs in the case. But if the matter of avoidance relates to another subject not inquired about by the examining party, although relevant to the matter in issue, it is not admissible within the rule that the whole conversation must be given of which the examining party has called only for a part. The further conversation, beyond what the examining party has called out, must not only relate to the matters in issue, but also to the fact called for by him by questions on his side. A party who calls for the admissions of his adversary on a particular point, must take with it all that was said on that point. Thus in *Credit v. Brown*, (10 John. 365,) the plaintiff in trespass for killing his dog proved that the defendant confessed that he had shot the dog, that assaulted him on the main road. Here the admission and the avoidance relate to the same subject and can not be disjoined. When taken together they amount to a justification. So also in *Smith v. Jones*, (15 John. 229,) in assumpsit for goods sold, the only evidence of the sale was the admission

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of the defendant, coupled with the allegation that he had paid for them. In *Carver v. Tracy*, (3 *John*. 427,) the defendant said he had received a dollar of the plaintiff, but it was his due. To the same effect is *Wailing v. Toll*, (9 *John*. 141.) In such cases, when there is no evidence with which to charge a party with a debt except his admission, and that admission is coupled with a declaration of payment or other discharge, and there is no other proof in the case, the plaintiff can not recover.

But those cases are distinguishable from this. In them the whole confession was made at the same time, and related to the same point of inquiry. In this, the confession given in evidence by the defendant related to a note, which was not the subject of the suit; and the plaintiff claims to use in his own favor a declaration made by himself, at the same time, upon the subject of the note in question. The transactions were entirely separate and distinct. A party making an inquiry as to the first, could not reasonably have expected an answer as to the last. And the matter thus proposed to be shown had no connection with the answer to the question originally put to the plaintiff; nor did it tend to qualify or limit it in any manner.

The exception to the refusal to charge as requested was not well taken. The fact that the plaintiff made a claim to the note, in the presence of the defendant and Bragg, and that both of them were silent, was proper evidence for the consideration of the jury, and was properly submitted to them by the court. The plaintiff's counsel required the judge to charge, that it was sufficient evidence that the plaintiff owned the note. This he very properly refused to do. There was nothing, in their silence, in the nature of an estoppel. There was other evidence, besides the plaintiff's claim and the defendant's silence, bearing on the question of title. The whole of it was proper for the consideration of the jury. The judge could not be required to separate a part from the whole, and instruct the jury as to its effect, when separated from the rest.

Motion for a new trial denied:

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42ap 36

SAME TERM. *Before the same Justices.*

EGLESTON vs. KNICKERBACKER.

Money paid by the debtor to the creditor, to be applied on a bond and mortgage, and which the creditor omits thus to apply, but obtains a decree in a foreclosure suit for the whole amount, can not be recovered back in an action for money paid, or money had and received.

The proper remedy in such a case is a motion to open the decree, to enable the defendant to prove his payments before the referee.

While the decree remains in force it is conclusive upon the parties, that the amount therein expressed is the true sum due.

Parol evidence is inadmissible to contradict or explain a written agreement.

A receipt is so far an exception to this rule, that it may be explained *as to the consideration part*, when the explanation is not contradictory to, but consistent with, the instrument.

A receipt, absolute in its terms, can not be shown, by parol evidence, to be upon condition; except on a proceeding to reform the instrument for fraud or mistake.

THIS was an action for money had and received, and was commenced on the 29th June, 1848, and was heard before a sole referee in October of the same year, who reported that there was nothing due from the defendant to the plaintiff. A motion had been made on the part of the plaintiff to set aside that report, and the cause came before the court on a case containing the testimony and the exceptions taken on the hearing before the referee. The plaintiff proved that on the 4th May, 1846, he paid to the defendant \$168, and took a receipt therefor, to be indorsed as interest on a bond assigned to the defendant by Jacob Merritt, against D. G. Egleston; and that on the 3d of May, 1847, he paid to the defendant the sum of \$84, and took a receipt, to apply the same in full of interest on one equal undivided half of the sum of \$2400, named in a bond and mortgage executed by Daniel G. Egleston to Jacob Merritt, and subsequently assigned to the defendant, on two brick buildings and lots 39 and 40, the said \$84 to be applied as the interest on No. 40.

The plaintiff gave in evidence the enrollment of the proceed-

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ings in this court, for the foreclosure of the mortgage, referred to in the said receipts, wherein the defendant in this suit was plaintiff, and the present plaintiff and others were defendants, whereby it appeared that the said bond and mortgage were executed by Daniel G. Egleston, on the 9th of April, 1836, to Jacob Merritt, for \$2400, covering lots 39 and 40 and part of No. 52 on the east side of Eighth-street, in the city of Troy; that the same were assigned to the now defendant Knickerbacker; that the mortgagor was dead; that the now plaintiff and others were the owners of the equity of redemption, and that the bill was taken as confessed on a personal service of the subpœna; that no personal claim was made upon the now plaintiff; and that the bill claimed interest on the said mortgage from the first of May, 1845, and the referee in said foreclosure suit reported that there was due on the mortgage, on the 25th of October, 1847, \$2817.04. The plaintiff then proved by the referee in the foreclosure suit, that in computing the amount due on the mortgage, no credit was allowed for either of the payments mentioned in the said receipts. That those payments were treated as a deposit, to be applied on the bond and mortgage in certain events, but what those events were he did not know. That the now defendant, then plaintiff, was examined by the referee upon oath, as to payments, under the 91st rule, and that the now plaintiff appeared by his solicitor before the referee, but not in person. These payments were not applied, and the decree was taken for the whole sum due, without making any deduction for said payments.

Evidence was then given on the part of the plaintiff tending to show that those two payments mentioned in the receipts, though expressed to be applicable to the interest on said bond and mortgage, were not so to be applied except upon the happening of a certain contingency, which did not occur; and that they were not in fact indorsed on the bond and mortgage, nor applied thereto, and that the now defendant, after the decree and on the day on which the premises were sold by the sheriff under the said decree, and at other times, promised to refund

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to the plaintiff the said sums of money. There was also conflicting evidence on that point.

The defendant then introduced the original mortgage, mentioned in the decree, and the assignment thereof to him, and proved that the now plaintiff was, at the time of the commencement of the foreclosure suit, the owner of the equity of redemption of lot No. 40, and part of 52 described in the mortgage, and the Kelloggs were the owners of the equity of redemption of the remaining lot covered by the mortgage, being No. 39. The defendant then proved by his solicitor in the foreclosure suit, that the amount of the decree and costs was, on the 13th of May, 1848, \$3042,72. The whole property sold for \$2800, and the defendant in this cause became the purchaser. The fees of the sale were \$42,20. The amount applied on the decree was \$2639,66, the amount of the deficiency was \$284,92. The foreclosure was commenced at the instance of the now plaintiff. He declined paying any more than half the interest, after the Kelloggs became purchasers of one of the lots.

The defendant's counsel then offered in evidence the examination of the now defendant, before the referee in the foreclosure suit, wherein the now defendant, then plaintiff, was examined under the 91st rule as to payments, there being infant defendants in said suit. This was objected to by the plaintiff's counsel as incompetent, on the ground that the defendant could not be permitted to use his own oath in his own favor, and especially as whatever declaration he made on that occasion was made when neither the plaintiff nor his counsel was present. The objection was overruled by the referee, and the plaintiff's counsel excepted. The examination of the now defendant, as plaintiff in the foreclosure suit, was then proved, in which he testified to the receipt of the money mentioned in the receipts, and that it was not indorsed on the bond and mortgage, and said "*that it was understood between him and the now plaintiff that the amounts were not to be indorsed so that they could be collected of the Kelloggs.*" Other evidence was given, and offers made, not material to the decision of the cause.

The defendant's counsel contended, before the referee, 1. That

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the moneys were applied at the time of the payment, by the terms of the receipts. 2. That the receipts could not be contradicted, and that they afforded no substantive ground of action. 3. That they should have been brought in in the foreclosure suit, on the reference before the referee, to compute the amount, and that the only remedy of the plaintiff now, was to open the decree. 4. That there had been no change of application of the moneys since giving the receipts. 5. That there was no promise to repay the money, and if one was made, it was without consideration, (1.) because the money was applied; (2.) because the pretended promise to repay was only in case the moneys could be collected of the Kelloggs, or raised by sale of the property, which could not be done; (3.) because the promise, if made, was so made in the full belief that the property was worth enough to pay the amount due.

On the part of the plaintiff it was insisted, 1. That there had been no application of the money mentioned in the receipts, to the payment of the bond and mortgage. 2. That the defendant had no right to apply such money on the decree, after the sale, without the plaintiff's consent, as the plaintiff was not in any way personally liable under the decree. 3. That there having been no application of such money, there was a sufficient consideration for a promise to pay, and that such promise had been fully proved.

On the 26th of December, 1848, the referee reported that he found that the application of the moneys paid to the defendant by the plaintiff, in the respective receipts mentioned, had not been changed by the parties; and that therefore there was nothing due to the plaintiff.

H. Z. Hayner, for the plaintiff.

W. Hay and W. T. Seymour, for the defendant.

By the Court, WILLARD, J. There is no doubt that the sums of money mentioned in the two receipts, actually came to the hands of the defendant before the foreclosure of his mort-

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gage, and that they were not credited by the referee in computing the amount due on the bond and mortgage. If those sums were intended as payments, according to the terms of the receipts, they can not be recovered back, whether they were allowed or not. It was the duty of the defendant in the foreclosure suit to bring in the receipts before the referee, and see that they were allowed; and if the referee improperly rejected them, to except to his report. The decree, while it stands in force, is conclusive evidence that the amount therein specified was justly due; and the present plaintiff can not impeach it in this collateral way.

The question whether this money was merely delivered to the defendant *as a deposit*, and not to be applied to the bond and mortgage, unless Kellogg paid a like sum, and to be refunded in case Kellogg omitted to pay, was a question of fact on which, as there was conflicting evidence, the finding of the referee must be deemed conclusive. The referee has found that the money was received in payment, and that the application thereof had not been changed by the parties. Unless the referee erred in receiving testimony on this point against the plaintiff's objection, the report can not be disturbed.

The referee probably erred in receiving, on the part of the defendant, the examination upon oath of the defendant when complainant in the foreclosure suit, taken in pursuance of the 91st rule. The plaintiff attempted to prove that examination by the referee, but failed to do so; from a want of recollection on the part of the referee. The defendant then, against the plaintiff's objection, proved it by his own solicitor, who was present when it was taken. The declarations of the plaintiff in the foreclosure suit were competent evidence against him, whether taken under oath or not, but were not admissible in his favor. The circumstance that the plaintiff attempted, without success, to prove those declarations, did not render them admissible on the part of the defendant. But the facts disclosed by that examination did not prejudice the plaintiff, and in such case we are not required to disturb the report, although the referee erred in receiving the evidence. (*Smith v. Kerr*, 1 Barb. Sup. Court

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Rep. 115.) Indeed, the evidence was more favorable to the plaintiff than against him.

But there was another objection, which seems not to have been made before the referee until the testimony was closed, viz. the objection against the evidence to contradict the receipts. If that evidence had been excluded, there would have been no color for the action. Unless the plaintiff could show the receipts to have been given upon condition, the referee was bound to treat them as applied according to their express terms. This leads to the inquiry as to the extent to which a receipt is open to explanation. By the general rule of evidence, independently of the statute of frauds, parol evidence can not be received to contradict a written agreement. The written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. (1 *Phil. Ev.* 561.) Even with respect to a receipt, it is only the consideration part which may be explained by parol; and the explanation which is admissible is that kind of explanation which is not contradictory to, but consistent with, the instrument. (*McKinstry v. Pearsall*, 3 *John.* 319.) Thus, in *Tobey v. Barber*, (5 *Id.* 68,) a receipt for "one hundred and sixty-three dollars in full for the second and third quarters' rent," was given in evidence, and the adverse party was allowed to show that the sum mentioned in the receipts embraced a promissory note for \$115, given by a third person, payable at the bank, in four months, and that the maker failed, and took the benefit of the insolvent act, before the note became due. This evidence was not inconsistent with the receipt. It merely showed of what the consideration of the receipt was composed, and that the plaintiff had not been benefited by it to its full extent. To the same effect is *Johnson v. Weed*, (9 *John.* 310;) *Putnam v. Lewis*, (8 *Id.* 389;) and *Southwick v. Hayden*, (7 *Coven.* 334.) The case of *House v. Low*, (2 *John.* 378,) is too loosely reported to afford much light on the subject. The defendant pleaded in bar of the plaintiff's demand a receipt in full, to which the plaintiff replied that it was given upon a condition which had not been performed by the defendant, on

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which issue was joined. The justice found that it was given upon condition. The court say, "The evidence to show that the receipt was conditional, was admissible. The parties joined issue upon that, without raising any objection; and a receipt may be explained by parol." Whether the condition was contained in the receipt or out of it, does not appear, though the latter is to be inferred. Nevertheless it does not appear that the evidence was objected to, and the court obviously place their decision upon the ground that the parties joined issue upon that point without objection. The plaintiff should have demurred to the plea if he wished to raise the question whether a receipt absolute in terms could be shown by parol to have been given upon condition.

The doctrine prevailed for a short time in this court that a deed absolute in its terms might be shown, in a court of law, by parol evidence, to be a mortgage. (*Roach v. Cosine*, 9 *Wend.* 227. *Walton v. Cronly*, 14 *Id.* 63. *Swart v. Service*, 21 *Id.* 36. *Webb v. Rice*, 1 *Hill*, 606.) The doctrine was strenuously resisted by some of the judges, and never met the acquiescence of the bar. Moreover, it was found in practice to be fraught with all the evils which led to the passing of the statute of frauds, and was a clear departure from the wise provisions of that statute, and the maxims of the common law. (*Sternes v. Cooper*, 1 *John. Ch.* 429.) It was at length finally overthrown by the court of errors, in *Webb v. Rice*, (6 *Hill*, 219,) by a nearly unanimous vote, and the older and better rule restored. Under the law established by the last mentioned decision it is difficult to perceive how a receipt, absolute in its terms, could be allowed to be shown by parol evidence to be conditional, except on a proceeding to reform the instrument for an error occasioned by fraud or mistake.

In *Tobey v. Barber*, (5 *John.* 68,) already cited, the action was covenant for rent due on a lease executed by the plaintiff to the defendant. One of the receipts given in evidence by the defendant, indorsed on a counterpart of the lease, was in these words: "Received of Uriah Coffin, five turnpike shares, deposited with Uriah Coffin by Ralph Barber, for me, for the last

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quarter's rent, due of Ralph Barber, before the assignment, agreeable to the within lease, the said shares being in the Schoharie Turnpike." On the trial the plaintiff was allowed to prove that the shares were received, not as payment, but upon the condition expressed in a letter of the defendant. The letter was dated a few days before the receipt, and stated that the plaintiff might receive the shares of Coffin, and keep them until April, when the defendant would redeem them. The shares not having been redeemed, the plaintiff was allowed to show their actual value. This parol evidence was not contradictory of the receipt. The receipt did not purport that those shares were taken as an extinguishment of the rent. It did not even express the *amount* for which they were received, nor their *value*. It seemed to recognize them as *deposited* with a third person, for the plaintiff, for the last quarter's rent. The defendant's letter and the receipt were in fact but a part of one transaction, and mutually explained each other. With this explanation the case is in perfect harmony with the other cases which have been cited.

The recent case of *Haddock v. Kelsey*, (3 Barb. Sup. Court Rep. 100,) affords a correct illustration of the principle on which a receipt may be explained. In that case, however, the two receipts simultaneously and reciprocally given by each party to the other, should be construed together, and it then becomes obvious how the plaintiff below had received \$207,20, the sum for which he sued. He had not received it in cash, but in the engagement of the defendant below to pay it, when audited and allowed by the proper department at Washington. The extrinsic evidence was entirely consistent with the whole transaction.

The decisions in other states are, for the most part, in accordance with ours, allowing an explanation by parol to a receipt, in matters not inconsistent with it. Thus, when it is without date, the time when it was executed may be shown by parol. (*Troubridge v. Sanger*, 4 Pick. 179;) also to show to what demand it is applicable. (*Brooks v. White*, 2 Metc. 283.) When a *moneyed* consideration is stated in an instrument, parol

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evidence is admissible to show that it was greater or less than is stated; (*Mead v. Steger*, 5 Port. 498;) and also that other considerations than those expressed passed between the parties.

But when a receipt is in the nature of a contract, it is, so far, within the general rule, and is not liable to be varied by parol evidence. (*See 2 Cowen & Hill's Notes*, 1439, and the cases there cited.) In the present case the receipts, in terms, express the manner in which the money was to be appropriated. On principle and authority they can not, in that respect be contradicted. It was competent, however, to prove a new appropriation of the money; but the proof fell short of the mark.

There is another view of this subject equally fatal to the plaintiff's right of recovery. On the merits he has no greater equity to recover back this money, than the defendant has to retain it. On the sale of the premises under the decree of foreclosure, in March, 1848, they failed to bring enough to satisfy the decree, by the sum of \$284,92; which sum exceeded the amount of the two receipts and interest thereon up to that day. It is not denied that the defendant is entitled to that sum from somebody. If the money mentioned in the receipts had been applied before the decree, and the premises had sold for the same sum, there would still have been no surplus money to return to the plaintiff, and the other owners of the equity of redemption. Should the decree be now opened, the only effect would be to apply the receipts on the bond and mortgage according to their terms. If the plaintiff should now move to open the decree, the defendant might answer the motion by an offer to apply the receipts upon the decree.

The plaintiff lays stress upon the fact that Merritt, in his assignment of the bond and mortgage to the defendant, guaranteed the payment. This does not increase the plaintiff's equitable title to reclaim this money. As between Merritt and the plaintiff, the equities still are that the payments made by the plaintiff should be applied on the mortgage. Good faith required that the defendant should collect his mortgage from the parties and funds primarily liable, rather than against a collateral guarantor. If the premises were worth, as is said, a much

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greater sum than they brought on the sale, the plaintiff should have attended and bid them up to their full value. He and the Kelloggs, the owners of the equity of redemption, would have been entitled to the surplus money, if there were no other liens.

On the whole, we think the case has been properly disposed of by the referee, and the motion to set aside his report should be denied.

SAME TERM. *Before the same Justices.*

KETTLE vs. LIPE and others.

In an action by a sheriff, upon a bond given to him by his deputy, for the faithful performance of his official duties, and to indemnify the obligee against the misconduct and defaults of the deputy, judgments recovered against the sheriff for omissions of duty by the deputy, are admissible as evidence, to prove not only the liability of the defendants, but also the amount of that liability; where it appears that the deputy had notice of the suits against the sheriff, and an opportunity to defend them.

DEMURRER to the defendants' 6th plea. The declaration was in debt on a bond given to the plaintiff by the defendants and one John F. Lipe, deceased, for the faithful performance by Lipe of the duties of deputy to the said plaintiff, who was then sheriff. The bond was given on the 1st day of January, 1835, and the plaintiff alledged that several executions were put into the hands of Lipe during the years 1836 and 1837, which he neglected to execute, and that the plaintiff was sued therefor on the 24th day of February, 1847, before a justice of the peace, of which suit the defendants had notice, and were requested to assume the defense thereof, and notified that if they did not it would be at their peril and responsibility. That five judgments were recovered against the plaintiff which he had paid. The 6th plea was in substance that the defaults accrued and hap-

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pened more than three years before plaintiff was sued, of which he had notice. The plaintiff demurred specially.

H. Adams, for the plaintiff.

P. Potter, for the defendants.

By the Court, HAND, J. The plea admits the default of the deputy sheriff Lipe, but relies upon the statute, which is, that "all actions against sheriffs and coroners upon any liability incurred by them by the doing of any act in their official capacity, or by the omission of their official duty, except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period." (2 R. S. 296, § 22.) The declaration alleges that the deputy did not save the plaintiff harmless, and did not make a faithful application of all moneys which came to his hands, but that on the contrary he omitted to levy and collect the executions therein specified. The suits against the plaintiff were for omissions of duty in executing the writs, and not for money had and received, as in *Elliot v. Cronk's Adm'rs*, (13 Wend. 35;) and such a cause of action, it seems admitted, can not be revived by acknowledgment. (*Id.* 40.) In *The People v. Everest*, this court compelled a sheriff to return a fi. fa. six or seven years after his deputy had made default in not returning it; but did not decide whether he would be liable for a false return made at that late period. (4 Hill, 71.) It does not appear from the declaration or plea, whether the plaintiff pleaded the statute, or indeed, whether he defended the suits at all. *Prima facie*, the statute was a bar, and this case must turn upon the question whether the judgments obtained against the plaintiff are evidence against the defendants. They had notice of the pendency of the suits, and if these judgments are conclusive, or even *prima facie*, evidence as against these defendants of the liability of the plaintiff for the defaults of Lipe, and not *inter alios acta*, the demurrer must be sustained.

How far a judgment against the obligee, for a default of the

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principal, is evidence in a suit on a bond with sureties given to indemnify against the misconduct and defaults in duty of the principal obligor, in some fiduciary or official station, has been a matter of some difficulty. Where a party undertakes for a collateral act, or is surety for a third person, and not for his own debt, if he is to perform on request, that must be averred and proved. (*Nelson v. Butrick*, 5 *Hill*, 39. *Burge on Suretiship*, 3, 23.) And if the contract is one of indemnity and the amount of the claim against the party indemnified is to be ascertained by an action against him, unless he give notice to the sureties, &c. no doubt the matter, in most cases, is open for examination when they are called upon to make indemnification. In this case, the suit against the plaintiff, for the delinquencies of the deputy, and notice of those suits to the defendants, and a request that they would defend, are admitted on the record; and I am inclined to the opinion, that these judgments, under the circumstances disclosed by the pleadings, were not only admissible, as evidence to prove the liability of the defendants, but also the amount of that liability. The cases of actions upon a limit bond are familiar to the profession. In *Kipp v. Bingham*, (6 *John*. 158, 7 *Id.* 168,) it was held that a suit against the sheriff, and notice thereof, followed by judgment, was conclusive evidence against the prisoner and his bail. And see *Duffield v. Scott*, (3 *T. R.* 374,) and *Blasdale v. Babcock*, (1 *John*. 517.) Indeed, as to limit bonds, the rule is now established by statute. (2 *R. S.* 435, § 49.) The principle advanced to sustain these decisions is, that where one has expressly or impliedly (as on a warranty of title to personal property) agreed to indemnify and save harmless another, and has notice of the suit in which the recovery is had, he is bound by the result of that suit. Whether he may show collusion, fraud, or neglect in the management of the defense, is not material here; as these are not alledged, and for all that appears, the plaintiff made a vigorous defense. Some of the cases intimate that the judgment is not evidence at all. But I think it is now pretty well settled that if the party indemnifying, warranting, guaranteeing, &c. has notice of the suit and a chance to defend, this makes

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him privy to the suit, and the judgment is evidence against him. (*Cowen & Hill's Notes*, 982, 3, 4, 821, 2, 817. 1 *Phil. Ev.* 332. *Douglass v. Howland*, 24 *Wend.* 57. *Aberdeen v. Blackmar*, 6 *Hill*, 324. *Riley v. Seymour*, 1 *Wend.* 143. *People v. Irving*, *Id.* 20. And see *Rockefeller v. Donnelly*, 8 *Cowen*, 623; *Lee v. Clark*, 1 *Hill*, 56; *Mann v. Eckford's Executors*, 15 *Wend.* 502; *Trustees of Newburgh v. Galatian*, 4 *Cowen*, 340; *Duffield v. Scott*, 3 *T. R.* 374; *Sparks v. Martindale*, 8 *East*, 593.) How far he must defend is another question. (7 *Bing.* 246. *M. & M.* 406.) I think the demurrer well taken, and there must be judgment for the plaintiff, with leave to the defendants to amend upon the usual terms.

Judgment for the plaintiff.

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SAME TERM. *Before the same Justices.*

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An assignment for the benefit of creditors, which substantially reserves to the assignors the right to give future preferences, is fraudulent and void as against the creditors of the assignors who have not assented thereto.

Accordingly, where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto, according to the priority of the several schedules, and provided that such schedules should be made within 60 days, and be annexed to, and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein; the preparation of such schedules being left entirely to the discretion of the assignors; and it appeared that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time; *Held* that the assignment was fraudulent and void.

The assignment must itself fix and determine the rights of the creditors in the assigned property, and not reserve to the assignors the power of subsequently doing so.

The fact that the assignment requires that the power reserved to the assignors shall be exercised within a certain specified time does not alter the principle.

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Even if the schedules are prepared and annexed within the time prescribed by the assignment, this will not render the assignment valid from the time the schedules are annexed.

The assignment, if fraudulent and void when executed and delivered, will not be rendered operative and valid by any subsequent act of the assignor.

Assignees acting under a void assignment, will not be held accountable for that part of the proceeds of the assigned property paid over by them to the preferred creditors, in pursuance of the assignment, before any other creditors have obtained a lien upon the assigned property.

Where a mortgage is given as collateral security for notes and drafts, and not in satisfaction thereof, the latter will not be extinguished by the former.

Where a partner gives a mortgage upon his separate property, to secure a partnership debt, he thereby becomes a surety for the firm, and is entitled to the rights and privileges of that character.

His separate creditors succeed to his rights and privileges as such surety. He, and his separate creditors, therefore, have a right to insist that the partnership property, being primarily liable, be first applied towards the payment of the debt, secured by such partner, before resort is had, for that purpose, to the separate estate of the surety.

And if the separate estate of the surety is first applied in payment of such debt, his separate creditors will be entitled to be subrogated to the rights of the creditor, as against the partnership fund.

Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims, and charges existing upon the property, according to their priorities.

Where land is sold under a judgment, and the surplus moneys are brought into court, creditors having liens upon the land, subsequent to the judgment, have the same liens upon the surplus moneys which they had upon the land, previous to the sale.

Their liens are transferred from the land to the surplus; and such surplus must be applied in discharge of the liens, according to the order of their priority.

THIS was a motion, made in behalf of the Agricultural Bank, and of the assignees of the defendant Loucks and of his copartner, Morgan Gray, for an order directing the sheriff of the county of Montgomery to pay over the surplus moneys in his hands, arising on the sale of real estate of the defendant under the execution issued in the above cause, to the Agricultural Bank, on a mortgage of said bank, given by the defendant, on one of the lots sold by the sheriff. The judgment in the above suit was docketed on the 11th of July, 1846. The sheriff advertised for sale under the execution issued on such judgment, and three executions issued on three judgments against George

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P. Loucks, the above defendant, and Morgan Gray and Peter G. Loucks, seven lots of land in Canajoharie. Lots 3dly, 4thly, 5thly and 6thly described in the advertisement of sale, were sold on the four executions. Lot 6thly described was first sold and was struck off for \$1300. Lot 5thly described, was next sold for \$2300. William I. Bellinger, who owned the four judgments, was the purchaser. The sale of these two lots satisfied the execution issued on the judgment in favor of Lewis Averill, and left a surplus of \$1500. The sheriff then sold lots 3dly and 4thly described, on the three younger executions, for \$10; which were also struck off to William I. Bellinger. On the 4th of September, 1848, George P. Loucks and Morgan Gray, who were copartners, assigned all their copartnership property, both real and personal, to assignees, in trust for their partnership creditors. On the same day, George P. Loucks assigned all his individual property in trust for the payment of his separate debts. The assignment of Loucks & Gray declared that the assignees should pay the debts in the schedules A., B., C., D. and E., annexed to the assignment. And it provided that the schedules were to be made and prepared as early as practicable, and within 60 days from the date thereof, and to be annexed to, and form part of the assignment. And the assignment declared that the debts in schedule A. should be preferred before those in the other schedules; those in B., over those in C., D. and E.; those in C. over those in D. and E.; and those in D., over those in E. The separate assignment of George P. Loucks, contained similar provisions as to preferences. This assignment was recorded on the 5th day of September, 1848. The schedules of debts, referred to in the assignment, were not recorded with it. And it did not appear when the schedules of debts referred to in either assignment, were made and prepared and annexed to the assignments. The assignment of Loucks & Gray, in referring to schedules D. and E., stated that they were to be annexed to and form a part of the assignment. George P. Loucks, on the 4th of September, 1848, and prior to the assignments, gave to the Agricultural Bank, a mortgage for \$6000, on lots 5thly and 2dly described in the sheriff's advertisement. The three

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junior judgments belonging to Bellinger, were docketed on the 28th and 29th of September, and on the 21st of December, 1848. The mortgage of the Agricultural Bank, was given by George P. Loucks as a collateral security for a debt of Loucks & Gray. This debt was preferred in the assignment of Loucks & Gray, being the first debt mentioned in schedule A. The buildings on lots 1, 2 and 7, were erected with the partnership funds of Loucks & Gray. These lots, with the exception of the buildings thereon, and lots 3, 4, 5 and 6, were the individual property of Loucks. Loucks also owned two other lots not described in the sheriff's advertisement. Loucks and Gray, when they executed the assignments, were insolvent; and the partnership property assigned was insufficient to pay their partnership debts. The three junior judgments were recovered on partnership notes, for debts of the partnership. Lot No. 2, covered by the mortgage of the Agricultural Bank, was mortgaged by George P. Loucks, for the purchase money, to an amount equal to the value of the lot, exclusive of the improvements which had been made by Loucks & Gray, and paid for with partnership funds; which improvements were worth \$2450. A part of the debt due to the Agricultural Bank had been paid by the assignees of Loucks & Gray, out of the partnership property assigned to them. The assignees of Loucks & Gray insisted that the judgment of Averill should be collected out of the individual property of George P. Loucks, other than the lot fifthly described, so as to leave that lot to be applied in payment of the mortgage of the Agricultural Bank, in exoneration of the partnership fund; to the end that the partnership fund might be applied in payment of the partnership creditors preferred next after the Agricultural Bank. The partnership property assigned, was more than sufficient to pay the debt of the Agricultural Bank.

T. B. Mitchell & H. Loucks, for the Agricultural Bank and the assignees of Loucks & Gray.

D. G. Lobdell & J. A. Spencer, for William I. Bellinger.

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By the Court, PAIGE, P. J. The motion in this case is made for the benefit of the partnership creditors of Loucks & Gray, who are preferred in the assignment of Loucks & Gray next after the Agricultural Bank. The debt of the Agricultural Bank is a partnership debt of the firm of Loucks & Gray, and is first preferred in the assignment. It is objected by the counsel of William I. Bellinger that the assignment of George P. Loucks is void because he substantially secures to himself the right to give future preferences. The assignment of Loucks & Gray is obnoxious to a like objection. Their assignment of their partnership property creates six classes of debts; the debts placed in the first five classes to be inserted in schedules marked A. B. C. D. and E. In the assignment it is stated that schedules A. B. and C. are annexed to the assignment; and that schedules D. and E. are to be annexed to, and form a part of, the assignment. The concluding clause of the assignment provides that the schedules to the assignment are to be made and prepared as early as practicable, and within 60 days from the date thereof, and to be annexed to and form a part of the assignment. The affidavits do not show when these schedules of debts were made out and annexed to the assignment. The assignment itself bears date, and was executed, on the 4th day of September, 1848. It was recorded on the 5th day of September, 1848. The certificates of acknowledgment and of the recording of the assignment precede the schedules. This is a circumstance which indicates that the assignment was executed and delivered before the schedules were annexed. The assignment prefers the debts in schedule A. over all the debts in the other schedules; the debts in schedule B. over those in C. D. and E.; those in schedule C. over those in D. and E.; and those in D. over those in E.; and the assignment declares that the debts in B. C. D. and E. are to be paid in the order in which they are put down in such schedules. The individual assignment of George P. Loucks bears date, and was executed, on the day of the date of the assignment of Loucks & Gray, and was recorded at the same time that assignment was recorded. It conveys to the assignees all the real estate of the assignor, and

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states that a schedule of the same is annexed. It assigns also all the assignor's personal property; and directs the assignees first to pay out of the assigned property the debts of the assignor in schedule B., stated to be annexed to the assignment, and in the order in which they are put down in the schedule; secondly, to pay the debts in schedule C., also stated to be annexed to the assignment, in the order in which they are put down in such schedule; and thirdly, to pay the debts in schedule D. The last clause of the assignment provides that an inventory of all the personal estate shall be made, as early as practicable, and annexed to and form a part of, the assignment; and that the schedules referred to in the assignment are to be made within 30 days from the date thereof, and to be annexed to and form a part of, the assignment. This assignment was recorded on the 5th day of Sept. 1848, without the schedules. And it appears by the certificate of the county clerk, dated May 3, 1849, that they had not been recorded, at the date of that certificate. I infer, from the evidence before us, that the schedules of debts referred to in the two assignments, had not been made out and annexed to the assignments when they were executed and delivered to the assignees; and that such schedules were prepared by the assignors, and annexed at some subsequent time. The assignments do not prescribe what debts shall be inserted in the respective schedules, or in what order they shall be arranged in such schedules. The preparation of the schedules is left entirely to the discretion of the assignors. The preference of one debt over another was to be determined by the class in which it was placed, and by the order in which it was inserted in such class. The right to give this preference was reserved by the assignors in the one assignment for the space of 60 days, and in the other for 30 days. Neither assignment declares the uses, nor fixes and determines the rights of the creditors, in the property assigned, but the power of subsequently doing this is reserved to the assignors. This, according to the settled doctrine of the courts of this state, renders the assignments fraudulent and void, as against such creditors as have not assented to them. The effect of the provision that the assign-

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ors may, at a future period, prepare and annex the schedules of the debts, giving preferences to the creditors, is substantially reserving to themselves the right to give future preferences among their creditors. That the right to give preferences is limited in the one case to 60 days and in the other to 30 days, it seems to me, does not obviate the objection to the assignments. The vice is inherent in the assignments. The law requires that the assignment must itself fix and determine the rights of the creditors in the assigned property. The principle is the same whether the assignor reserves the right to determine the preferences to be given, within 60 days, six months, or three years. In either case it places the creditors in the power of the debtor, and compels them to acquiesce in such terms as the debtor may think proper to prescribe as the only conditions upon which they are permitted to participate in his property. This is a fraud upon the creditors, and necessarily delays and hinders them in the collection of their debts. (*Wakeman v. Grover*, 4 Paige, 41; *S. C.* 11 Wend. 203, 221. *Barnum v. Hempstead*, 7 Paige, 571. *Boardman v. Halliday*, 10 Id. 227, 228. *Sheldon v. Dodge*, 4 Denio, 221. *Hyslop v. Clark*, 14 John. 462.) It may perhaps be urged that the assignments are not absolutely void, but may be regarded as imperfect instruments until the schedules are annexed, and that they can take effect as valid instruments at the time of the annexation of the schedules. I think, however, that even if the schedules were prepared and annexed within the time prescribed by the assignments, the assignments can not be considered valid, even from the time such schedules were annexed. The assignments, if fraudulent and void when executed and delivered, could not be rendered operative and valid by any subsequent act of the assignors. It is possible that the assignees may be able to show that all the schedules of debts were prepared and annexed to the assignments before they were executed and delivered. I will therefore not preclude them, by the disposition of this motion, from showing that fact on any future motion in this suit, or in any other suit which may be hereafter commenced, involv-

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ing the question of the validity of the assignments, or of either of them.

It is not necessary, on the decision of this motion, to determine what effect the provisions in the assignment of Loucks & Gray in relation to schedules D. & E. which convey the idea that they are to be annexed at some future time, have upon the validity of that assignment. I shall consider, for the purposes of this motion, that both assignments are fraudulent and void; and that therefore the assignees have no right to interfere with the disposition of the surplus moneys in the hands of the sheriff. The assignments will undoubtedly be considered valid as to such creditors as have assented to them. And the assignees will not be held accountable for that part of the proceeds of the assigned property paid over by them to the preferred creditors, in pursuance of the assignment, before any other creditors obtained a general or specific lien on the assigned property. (4 *Paige*, 24, 42. 5 *Id.* 22.)

It appears by the opposing affidavits that the mortgage given by George P. Loucks to the Agricultural Bank, for \$6000 on lots secondly and fifthly described in the sheriff's advertisement of sale, was given as collateral security for partnership notes and drafts of Loucks & Gray, and which are the same notes and drafts that are preferred in schedule A. of the assignment of Loucks & Gray. The mortgage not having been given in satisfaction of these notes and drafts, the latter were not extinguished by the former. (*Drake v. Mitchel*, 3 *East*, 251, cited in *Robertson v. Smith*, 18 *John.* 480, per *Spencer, J.*) Loucks, by giving the mortgage on his separate property, became a surety for the firm, to the Agricultural Bank, and is entitled to the rights and privileges of that character. And his separate creditors succeed to his rights and privileges as such surety. Loucks and his separate creditors have a right to insist that the partnership property, being primarily liable, be first applied towards the payment of the debt of the Agricultural Bank, before resort is had, for that purpose, to the separate estate of George P. Loucks. And if the separate estate of Loucks is first applied in payment of such debt, his separate creditors will be entitled

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to be subrogated to the rights of the Agricultural Bank, as against the partnership fund. (*Wilder v. Keeler*, 3 Paige, 167, 170. *Besley v. Lawrence*, 11 Id. 588.)

The three junior judgments of William I. Bellinger were recovered on partnership notes, and they must therefore be regarded as partnership debts. The contest then, on this motion, between the Agricultural Bank and William I. Bellinger is a contest between two partnership creditors of Loucks & Gray; both of whom have acquired legal, specific, and general liens on the individual real property of George P. Loucks, one of the partners. Of these liens a court of equity can not deprive them. Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims, and charges existing upon the property, according to their priorities. (*Story's Eq. Jur.* § 553.) The property in question (the lot fifthly described in the sheriff's advertisement) was of such a nature that the judgment and mortgage creditors of George P. Loucks and of Loucks & Gray, could obtain a general and specific lien thereon, at law. The Agricultural Bank, by its mortgage, acquired a specific lien; and Bellinger, by his three judgments, obtained a general lien, on each lot, before its sale by the sheriff. And they have the same liens on the surplus moneys arising on the sale thereof, under the prior judgment of Lewis Averill, which they had on the lot before the sale. Their liens are transferred from the land to the surplus; and such surplus must be applied in discharge of such liens according to the order of their priority. (*Purdy v. Doyle*, 1 Paige, 558; *De La Vergne v. Evertson*, Id. 181.) The Agricultural Bank acquired its lien before the three junior judgments of Bellinger were docketed. The whole surplus, therefore, if the sale is not set aside, must be applied on the mortgage of the Agricultural Bank, as it appears that at least an amount equal to the surplus is due on the mortgage. That the sale was on the four executions can not affect the right of the Agricultural Bank to the surplus, as the purchaser will derive his title under the eldest judgment, which, unless the Agricultural Bank is permitted to take the surplus, will effectually

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deprive the bank of its lien on the land, and will give a priority over the lien of the mortgage to junior judgments, which would be contrary to the rules both of law and equity.

I do not think that the rule which prevails where a judgment creditor has a lien upon two funds, and a second judgment creditor a lien upon one of them, will aid Bellinger. To make this rule applicable, the assignment of Loucks & Gray must be considered as valid, in which the Agricultural Bank is preferred. If this assignment is regarded as valid, it gives the partnership creditors preferred therein next after the Agricultural Bank, a preference over Bellinger as the owner of the three junior judgments; as their equity is coeval with the execution of the assignment, which was prior in point of time to the equity of Bellinger, which arose at the time his three judgments were docketed. The equity of those partnership creditors being equal to that of Bellinger who is also a partnership creditor, and prior in point of time, they would have a right to insist, as against Bellinger, that the Agricultural Bank first exhaust its remedy against the individual real property of George P. Loucks, included in the mortgage. (*Besley v. Lawrence*, 11 *Paige*, 587, 588.) As against the separate creditors of George P. Loucks, these partnership creditors would have no such equity. If Bellinger conceives that, having by superior diligence, obtained judgments against Loucks & Gray, and acquired thereby a general lien on the individual property of George P. Loucks, he has, by virtue of such lien, the rights of a separate creditor, I will leave him to assert that right in some other proceeding than on this motion.

If both assignments are regarded as valid, the separate creditors preferred in the individual assignment of George P. Loucks, would have a right to compel the Agricultural Bank to resort to the partnership fund for payment, before enforcing their remedy against the individual property of George P. Loucks, as the partnership fund is primarily liable for the payment of the debt of the Agricultural Bank; and as the established rules of equity, on the insolvency of a partnership, or the death of one of the partners, give a partnership creditor a preference in

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payment, out of partnership property, and separate creditors a preference in payment out of the individual estate of the co-partners. (6 *Paige*, 20. *Payne v. Matthews*, 3 *Id.* 167, 171, 172.)

I will not attempt to settle on this motion, all the equities of the parties before the court, and also of other parties who are not represented here. (4 *Paige*, 23.) But I will leave them to be disposed of in some suit or proceeding in which all the parties in interest may be brought before the court, and all the facts having a bearing upon the case, may be presented.

In the opposing affidavits, it is stated that the lot fifthly described in the sheriff's advertisement, was bid off by the counsel of Bellinger, for a sum exceeding its value, and solely in view of the bid being applied upon the four executions on which it was sold. And the lots thirdly and fourthly described in the advertisement were probably sold under the impression, on the part of the partnership creditors of Loucks & Gray, that the assignments were valid, and they may therefore have omitted to bid up such lots to their full value. I have therefore come to the conclusion that the sale of lots fifthly, thirdly and fourthly described in the sheriff's advertisement should be set aside, without prejudice to the right of Bellinger to resell under his executions, the same lots, or any other property subject to the lien of his judgments, and without prejudice to the right of any of the parties to file a complaint, or to institute any other legal proceeding to test the validity of the assignments, and to settle the rights of the partnership and individual creditors of Loucks & Gray in their partnership and individual property. No costs are to be allowed, on this motion, to any of the parties.

Ordered accordingly.

SAME TERM. *Before the same Justices.*

WATSON vs. LE ROW, administrator, &c. and others.

In 1839 E. B. gave a bond and mortgage to D. for \$2625, which were afterwards assigned to W. In 1842 W. foreclosed the mortgage, in chancery. On the sale of the premises there was a deficiency of \$2387; for which sum the decree was docketed, in August, 1842. An execution was issued, and returned unsatisfied. On the 17th of May, 1843, W. assigned the decree to the plaintiff. On the 18th of September, 1849, E. B. became entitled to have conveyed to him, in fee, a lot of land by M. and C., in pursuance of a previous contract for the purchase of the same; he having paid to M. and C. the whole of the consideration money. By the direction of E. B., on the 26th of May, 1841, M. and C. conveyed the lot of land to trustees in trust for N. B., the wife of E. B. In August, 1845, E. B. died, and his wife in June, 1843. On the 7th of May, 1841, the plaintiff in this suit and W. K. W. recovered a judgment against E. B., upon which a creditor's bill was filed, in September, 1841, and in October, 1841, a receiver was appointed. In February, 1842, E. B., in obedience to an order of the court, made a general assignment, to the receiver. On the 6th of November, 1844, the receiver sold to the defendant H., at public auction, all the right, title and interest which E. B. had in the lot in question on the 7th of May, 1841, or at any time afterwards, and executed to him a deed therefor. On a bill by the plaintiff, against H., the administrators of E. B., the heirs at law of N. B., his wife, and the trustees named in the deed of trust, to obtain satisfaction of the decree obtained by W. against E. B., and assigned to the plaintiff, out of the lot in question, in which bill it was alleged that a trust resulted in favor of the plaintiff as a creditor of E. B. from the deed from M. and C. to the trustees for the wife of E. B., on the ground that the consideration money was paid by E. B., and that the deed in trust was made with the intent to defraud the creditors of E. B., who was, at the time and afterwards, insolvent;

- Held*, 1. That the conveyance by M. and C. to trustees in trust for Mrs. B., if valid, came within the 52d section of the article of the revised statutes relative to uses and trusts. That a trust, under the provisions of that section, resulted to E. B. in favor of his existing creditors, which was an equitable interest in the premises in question, capable of being reached by a creditor's bill.
2. That upon this equitable interest the plaintiff and W. obtained a specific lien by the filing of their creditor's bill in September, 1841; and that it was transferred to the receiver by the assignment of E. B., and passed to the defendant H. on the sale to him, by the receiver, of E. B.'s interest in the lot in question.
3. That the sale and conveyance by the receiver, to H., vested in him the whole equitable estate in the land, and authorized him to compel the heirs at law of Mrs. B. to convey to him the legal title.
4. That it being alleged in the bill, and admitted by the defendants, that the

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deed of trust in favor of Mrs. B. was made with the intent to defraud the creditors of E. B., such deed was absolutely void, not only as to the antecedent but also as to the subsequent creditors of E. B.; and was to be regarded as if it had never existed; at least, as to those creditors who should elect to impeach it.

5. That the deed of trust being out of the way, E. B.'s interest in the premises in question was an equitable interest, derived under his contract of purchase with M. and C.; which equitable interest was reached by the creditor's bill of the plaintiff and W. against E. B., and was transferred to the receiver by the assignment of E. B., and sold and conveyed by the receiver to the defendant H.; who had a right to call upon M. and C. to convey to him the legal title.
6. That the right of H. to the premises in question was paramount to that of the plaintiff, and that under the deed from the receiver, he was entitled to hold such premises.

It is a general rule, that the question whether a trust results or not, must depend upon the intention of the parties.

A voluntary purchase, by the husband, in the name of his wife, will be fraudulent as against antecedent creditors, in like manner, as if the settlement was of property actually vested in the husband.

IN EQUITY. This was an appeal from a decree of the vice chancellor of the eighth circuit. The bill was filed by the complainant, to obtain satisfaction of a decree in chancery obtained by one William Watson against Elijah Bigelow, out of a lot of land in Erie county, in which it was alledged in the bill that a trust resulted in favor of the plaintiff as a creditor of Bigelow. In May, 1839, Bigelow gave a bond and mortgage to one Dibble, for \$2625; which were afterwards assigned to William Watson. William Watson, in February, 1842, foreclosed the mortgage in chancery. On the sale of the mortgaged premises there was a deficiency of \$2,387,50; for which sum the decree was docketed in Monroe and Erie counties, in August, 1842. An execution was issued on the decree, and returned unsatisfied. On the 17th of May, 1843, William Watson assigned the decree to the plaintiff. On the 18th of September, 1840, Bigelow became entitled to have conveyed to him, in fee simple, a lot of land in Erie county, by Marcy and Clark, the owners thereof, in pursuance of a previous contract for the purchase of the same; he having paid to Marcy and Clark the whole of the consideration money agreed to be paid to them therefor. By the direction of Bigelow, Marcy & Clark, on the 26th day of May, 1841, conveyed the said lot of land to S. Bigelow and Kingsley

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in trust for Nelly Bigelow, the wife of Elijah Bigelow. The plaintiff, in his bill, charged that the whole consideration money for the land was paid by Bigelow; and that the conveyance in trust for his wife, was made with the intent to defraud his creditors, and particularly William Watson or some prior owner of the bond and mortgage, and that Bigelow, at the time of making the said decree, was, and continued during his life, wholly insolvent. Bigelow died on the 24th August, 1845; and his wife Nelly Bigelow died in June, 1843. The bill was filed against the administrators of Bigelow, the heirs at law of his wife, and S. Bigelow and Kingsley, to whom the lot was conveyed in trust for Nelly Bigelow. The bill was taken as confessed against all these parties. The defendant H. Harris appeared and put in an answer, and claimed to be the owner of the lot of land in question, as a purchaser from a receiver in a previous creditors' suit against Bigelow. On the 7th May, 1841, the plaintiff in this suit and William K. Watson recovered a judgment against Bigelow for \$3394,68, upon which an execution was issued and returned unsatisfied. A creditor's bill, founded on such judgment, and the execution so returned, was filed by the plaintiff and the said William K. Watson against Bigelow, on the 16th of September, 1841; and in October, 1841, William Watson was appointed receiver in such suit. In February, 1842, Bigelow, in obedience to the order of the court, made a general assignment, in the usual form, to the receiver. The receiver, at public auction on the 6th November, 1844, sold to the defendant Harris, all the right, title and interest, which Bigelow had in the lot in question on the 7th May, 1841, or at any time afterwards, for \$500, and executed to Harris a deed founded on such sale, dated the 7th December, 1844. The bill in such creditors' suit was in the usual form. It contained an allegation that the defendant was the owner of, or in some way or manner beneficially interested, in some real estate.

R. W. Peckham, for the plaintiff.

S. Stevens, for the defendant Harris.

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By the Court, PAIGE, P. J. On the 26th of May, 1841, the interest of Bigelow in the lot of land in question, was an equitable interest. He was in equity the owner in fee, having paid the whole consideration money of the land to Marcy and Clark, from whom he purchased it; and they, in equity, were his trustees. (1 *Barb. Sup. Court Rep.* 499. 2 *Story's Eq. Jur.* § 1212. 6 *John. Ch.* 402, 405.) At law, Marcy and Clark were the legal owners, but were liable to be compelled by a bill in equity to convey the legal title to Bigelow. The revised statutes (1 *Vol. p.* 728, §§ 45, 46, 47, 48) did not divest the legal estate of the vendors and vest it in the vendee, although in equity the vendors were mere naked trustees, as the vendee did not acquire his interest by virtue of any grant, assignment or devise. The equitable interest of Bigelow, in the premises in question, although he had paid all the purchase money, was not the subject of sale on an execution; nor could a docketed judgment or decree create a lien on it. The revised statutes declare that the interest of a person holding a contract for the purchase of land, shall not be bound by the docketing of any judgment or decree, nor be sold by execution upon any such judgment or decree. (1 *R. S.* 744, § 4. *Talbot v. Chamberlain*, 3 *Paige*, 220. *Grosvenor v. Allen*, 9 *Id.* 76. *Griffin v. Spencer*, 6 *Hill*, 525.) This provision of the revised statutes excepts the case of an equitable interest in real estate created by a contract of purchase, from the rule applicable to equitable interests in lands, which in equity subjects them to the lien of judgments. (9 *Paige*, 76. 10 *Id.* 569. 18 *Wend.* 240, 241, 253.) It is very apparent that the judgment recovered by the plaintiff in this suit and William K. Watson against Bigelow, on the 7th May, 1841, under which the defendant Harris claims, was not a lien in equity upon the equitable estate of Bigelow, in the premises in question, at the time of the conveyance by Marcy and Clark to trustees, in trust for Mrs. Bigelow.

If the conveyance by Marcy and Clark to trustees, in trust for Mrs. Bigelow, by the direction of Bigelow, passed the legal estate to Mrs. Bigelow; and if a trust resulted to Bigelow in favor of his then existing creditors, under the revised statutes, (1 *Vol.* 728,

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§ 52,) as is asserted by the plaintiff's counsel, and as is conceded by the counsel of Harris, did the judgment against Bigelow, under which Harris claims, become a lien in equity on the trust estate, which so resulted to Bigelow in favor of his creditors?

According to the opinion intimated by the chancellor in *Brewster v. Power*, (10 *Paige*, 560,) such judgment became a lien in equity, upon such trust estate, and was entitled to a preference over all subsequent liens and claims, except as against a purchaser for a valuable consideration, without notice, although the premises could not be sold upon execution on the judgment.

It is a familiar principle, where several equities affect the same estate, that if the equities are otherwise equal, they will attach upon the estate according to the periods at which they commenced; for it is a maxim of equity as well as of law, that *qui prior est tempore potior est jure*. (2 *John. Ch.* 608. 18 *Wend.* 240, 253. 9 *Paige*, 76.) If the chancellor's view of this question is the correct one, although there might be some doubt whether the assignment of Bigelow to the receiver, and the sale by the receiver of the lands in question to Harris, passed to Harris, any legal interest in such lands, yet the sale to Harris, and the payment by him of the purchase money, and the acceptance of the same by Stephen V. R. and W. K. Watson, would at least create, in favor of Harris, an equity to compel them to assign to him their judgment against Bigelow, so far at least as to enable him to enforce their lien in equity by a complaint in the nature of a bill in equity against the premises in question. And this equity of Harris would be sufficient to deprive the plaintiff in this suit of the relief he asks in his bill.

It is insisted, on the part of the plaintiff, that the creditor's bill filed by the plaintiff and William K. Watson against Bigelow, did not reach the trust which resulted in favor of the creditors of Bigelow, because Mrs. Bigelow and the trustees were not made parties to the bill. And it is also insisted, on the part of the plaintiff, that the only interest which was reached by that bill, and which was, or could be sold by the receiver, was the estate of Bigelow as tenant by the curtesy in the lot in

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question. Upon the hypothesis assumed by the counsel of the plaintiff, that the conveyance to the trustees in trust for Mrs. Bigelow came within the 51st and 52d sections of the article of the revised statutes relative to uses and trusts, a trust on the execution and delivery of the conveyance resulted to Bigelow in favor of his then existing creditors. This resulting trust was an equitable interest of Bigelow in the lands, for the benefit of such creditors. This equitable interest was peculiarly a proper subject for the operation of a creditor's bill. It is the appropriate office of a creditor's bill, to reach the property of the judgment debtor, which is not the subject of levy and sale on execution. Such property consists of equitable interests in real and personal estate and things in action. (2 R. S. 174, §§ 38, 39, 1 Paige, 308, 9. *Beck v. Burdett*, Id. 637. *Edmeston v. Lyde*, 4 John. Ch. 687.) The creditor obtains no specific lien on the equitable estate and things in action of his debtor by the issuing of an execution, or by its return unsatisfied. He only acquires such lien by the filing of his bill in equity, after the return of his execution at law. (1 Paige, 309, 640.) And wherever there remains in the debtor an equitable interest in real or personal property, the filing of the creditor's bill against the debtor alone, will give the judgment creditor a specific lien thereon, and such interest may be transferred to a receiver, and sold and conveyed by such receiver under the order and decree of the court; and the purchaser can call upon the trustee of the defendant for a conveyance or an assignment of the real or personal property in which the debtor has such equitable interest, in the same manner as the defendant himself might have done, previously to the filing of the bill. (1 Paige, 640.) In all such cases the trustee is not a necessary party. It is only where the debtor has fraudulently assigned his property, and has no legal or equitable rights as against the assignee, that it is necessary to make the assignee a party, to enable the court to reach the property in his hands. (*Edmeston v. Lyde*, 1 Paige, 640.) In this case, if the conveyance by Marcy and Clark to S. Bigelow and Kingsley, in trust for Mrs. Bigelow, came within the 52d section of the article relative to

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uses and trusts, a trust under the provisions of that section resulted to Bigelow in favor of his existing creditors, which was an equitable interest in the premises in question. Upon this equitable interest Stephen V. R. Watson and William K. Watson obtained a specific lien on the filing of their creditor's bill; and it was transferred to the receiver by the assignment of Bigelow, and passed to the defendant Harris on the sale to him, by the receiver, of the lands in question. The sale and conveyance to Harris vested in him the whole equitable estate in the land, and authorized him to compel the heirs at law of Mrs. Bigelow to convey to him the legal title. The only effect of not making the trustees and heirs at law of Mrs. Bigelow parties to the creditor's bill, was, that the decree in the creditor's suit did not conclude them, and they were left at liberty to controvert the allegation, that a trust estate resulted to Bigelow in favor of his creditors.

If the supreme court gave a correct construction of sections 45, 51 and 52, of the article in relation to uses and trusts, in *Wait v. Day*, (4 *Denio*, 442,) no doubt can exist on the subject of the title of Harris to the lot in question, under his deed from the receiver. In *Wait v. Day* the supreme court decided that the trust which resulted in favor of the creditors of the person paying the consideration, to the extent necessary to satisfy their just demands, was turned by the 45th section of the statute of uses and trusts into a legal right, cognizable as such in the courts of law.

Chief Justice Bronson says, in his opinion in that case, that by the 51st and 52d sections a trust never results for the benefit of the person who pays the consideration, but only for the benefit of his creditors. He says, "It does not result to, but 'in favor' of the creditors. It results to the debtor for their benefit. And then the 45th section turns the equitable interest of the debtor in the land into a legal right, cognizable as such in courts of law, and of course subject to sale on execution."

If, then, the equitable interest of Bigelow in the land was turned into a legal right, it can not be denied that the legal title passed to the receiver by his assignment made under the order of the court, and was conveyed to Harris by the receiver's

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deed. If the estate so conveyed to Harris was a legal estate, no legal proceeding against the heirs of Mrs. Bigelow is necessary to perfect his title, and he is now seised of both the legal and equitable estate. It was unnecessary to make the heirs of Mrs. Bigelow parties, in reference to any surplus which might arise on the sale of the premises. Such surplus, if any, would of course be paid into court, and the heirs would be entitled to receive what remained of the same after the payment of all the debts of Bigelow, due to such persons as were his creditors at the time the consideration of the conveyance was paid.

The allegations in the creditor's bill were sufficiently comprehensive to embrace the interest of Bigelow in the land, whether that interest was legal or equitable. The bill contained an allegation that Bigelow was the owner of, or in some way or manner beneficially interested in, some real estate; and it prayed that Bigelow might be decreed to apply in payment of the judgment of the plaintiff any property, real or personal, in law or equity, belonging to him or held in trust for him, or in which he was in any way or manner beneficially interested.

The sale by the receiver, without a special order of the court, was regular. The sale was after the final decree in the cause. (*Rule 192 of ed. of 1844.*) If a special order had been required by the rules of the court, the title would nevertheless have passed to Harris by the receiver's deed. (4 *Hill*, 173.) But it seems that the amended final decree expressly authorized the receiver to sell the interest, legal or equitable, which Bigelow had in any real estate on the 3d of May, 1841, or at any time afterwards.

Previous to the revised statutes, if a person purchased real estate and paid for it with his own money, and took a conveyance of the legal title in the name of another, there was, in equity, a resulting trust in favor of him who paid the money, unless it satisfactorily appeared that the purchase was intended as a gift or advancement to the person in whose name the conveyance of the legal title was taken. (10 *Paige*, 567.) The revised statutes changed the law on this subject. (1 *R. S.* 728, §§ 51, 52.) They provide that no trust shall result for the benefit of the person who paid the consideration; but only in favor

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of his creditors, and for their benefit. It was the intention of the revised statutes to put an end to all resulting trusts in favor of the person paying the consideration, where the conveyance was taken with his consent or knowledge in the name of another. At common law, if a husband purchases lands in the name of his wife, it will be presumed, in the first instance, to be an advancement, or provision for the wife, and no trust will result to the husband. (1 *Cruise, tit. Trust, ch. 1, §§ 43, 55. 2 Story's Eq. Jur. § 1204.*) This presumption may be repelled by evidence. (1 *Swanst. Rep. 17. 10 Ves. 367, Summer's ed. notes. 8 Id. 195, notes, p. 207.*) But the *onus probandi* does not rest upon the wife. (*Finch v. Finch, 15 Id. 51.*) Those who insist that a trust results to the husband must make it out by evidence. In *Guthrie v. Gardner, (19 Wend. 414,)* it was held that if it be shown the object of the husband was to defraud his creditors, it may be assumed that the idea of a provision for the wife was sufficiently rebutted to allow of a resulting trust in favor of the husband, which might be sold on execution, and the legal title thereby transferred to the purchaser, by virtue of the 4th section of the old statute of uses. (1 *R. L. of 1813, p. 74.*) Had it not been for this decision I should have apprehended that the legitimate consequence of the husband's causing a deed of land, purchased and paid for by himself, to be taken in the name of his wife, with intent to defraud his creditors, would have been to make the deed void, and to compel the creditors of the husband to resort to a court of equity to obtain possession of, or payment out of the consideration money paid for, the land. The revised statutes, (1 *R. S. 728, §§ 51, 52,*) have no application to cases where no trust would, at common law, result to the person paying the consideration. If, then, at common law, no trust would have resulted to Bigelow on the conveyance being made to his wife, sections 51 and 52 of the article in relation to uses and trusts have no application. At common law the conveyance in trust for Mrs. Bigelow would be presumed an advancement for her, and not a trust for her husband. And those who insist that a trust resulted, are required to repel this presumption by evidence. It is a general

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rule that the question whether a trust results or not must depend upon the intention of the grantor. (*Cook v. Hutchinson*, 1 *Keen*, 50. 1 *Paige*, 265.)

A voluntary purchase in the name of the wife, by the husband, will be fraudulent as against antecedent creditors, in like manner as if the settlement was of property actually vested in the husband. (*Sug. on Ven.* 627. 19 *Wend.* 415.) A voluntary conveyance in favor of a wife or child, by one indebted at the time, is prima facie fraudulent as to antecedent creditors. (*Seward v. Jackson*, 8 *Cowen*, 454, 434. 4 *Wend.* 303. 7 *Id.* 436. 11 *Wheat.* 213. 8 *Id.* 229. 1 *Pet. C. C. Rep.* 460. 5 *Pet.* 280.) And an antecedent creditor has, even under the revised statutes, the right to require of the person claiming under the voluntary conveyance, to rebut by evidence the presumption of fraud. (*Wood v. Jackson*, 8 *Wend.* 32, *per chancellor.*) Although in an action at law the prima facie evidence of fraud is to be submitted to, and passed upon by, the jury. (4 *Wend.* 303. 7 *Id.* 436.)

In this case the fraudulent intent of Bigelow, in causing the conveyance to be made to his wife, is alleged in the plaintiff's bill, and admitted by the heirs at law of Mrs. Bigelow. It is expressly alleged in the bill that the conveyance was made with intent to defraud Bigelow's creditors. And as the bill is taken as confessed by the trustees and heirs at law of Mrs. Bigelow, they have admitted this allegation to be true. If the conveyance was made with this intent, the statute of frauds pronounces it absolutely void. And it is not only void as to the antecedent, but also as to the subsequent, creditors of Bigelow. (4 *Kent's Com.* 309, note 6. 3 *John. Ch. Rep.* 481.) If this conveyance is absolutely void, it is to be regarded as if it had never existed, at least as to those creditors who elect to impeach it. (18 *John.* 526.) The conveyance out of the way, Bigelow's interest in the premises in question was an equitable interest, derived under his contract of purchase with Marcy and Clark. This equitable interest was reached by the creditor's bill of Stephen V. R. Watson and William K. Watson against Bigelow, and was transferred to the receiver by the assignment of Bige-

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low, and sold and conveyed by the receiver to Harris. (1 R. S. 744, §§ 4, 5.) And Harris having thus acquired all the interest of Bigelow under the contract, he has a right to call upon Marcy and Clark to convey to him the legal title. The heirs of Mrs. Bigelow can not now gainsay this right, having, by allowing the bill in this suit to be taken as confessed against them, admitted that Bigelow caused the conveyance to Mrs. Bigelow to be made with intent to defraud his creditors. By considering the conveyance in trust for Mrs. Bigelow as fraudulent and void, it may be objected that Mrs. Bigelow and the trustees ought to have been made parties to the creditor's bill, to enable the court to reach the interest of Bigelow in the land in question. But I can not see why the decree in the creditor's suit, the assignment to the receiver, and the sale to Harris, were not as effectual in passing to the latter the interest of Bigelow, under his contract of purchase, as a sale by a judgment creditor of a fraudulent grantor, under a judgment and execution at law, is to pass the title to the purchaser of the land fraudulently conveyed.

I can not conceive how it was necessary to make Mrs. Bigelow a party to the creditor's suit, to enable the court to reach the interest of Bigelow in the land in question. She was undoubtedly a necessary party to enable the court to reach her interest therein, if she had any. Why can not Harris file his complaint against Marcy and Clark and the heirs at law of Mrs. Bigelow, and compel the former to convey to him the legal title, and the latter to deliver up the possession? I see no objection to such a proceeding. The heirs at law may perhaps, in the suit against them by Harris, be entitled to controvert the allegation that the conveyance in trust for Mrs. Bigelow was fraudulent, or the allegation that a trust resulted to Bigelow in favor of his creditors, unless they are estopped from doing so by suffering the bill in the present suit to be taken as confessed against them. But whatever may be the result in regard to the right and interest of Harris under the receiver's deed, to be deduced from the assumption that the conveyance in trust for Mrs. Bigelow was fraudulent and void as against creditors, I have no doubt—upon the ground that a trust resulted to Bigelow

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in favor of his creditors, which must be assumed, from the decision in *Guthrie v. Gardner, supra*, and which is alledged by the plaintiff in his bill, and can not therefore be denied by him, whether that trust was a mere equitable interest in Bigelow for the benefit of his creditors, or was turned into a legal estate for the benefit of such creditors—that Harris is entitled, under his deed from the receiver, either in law or equity, to the premises in question.

The right of Harris is paramount to that of the plaintiff. All the interest of Bigelow in the premises was conveyed to the receiver in February, 1842, which was several months before the entry or docketing of the decree against Bigelow under which the plaintiff claims, and four years before the plaintiff filed his bill in this suit.

The decree of the vice chancellor of the 8th circuit must be reversed, with costs; and the plaintiff's bill must be dismissed as to the defendant Harris, with costs.

AT CHAMBERS. Before *Harris*, Justice, May 21, 1849.

DE BARANTE vs. GOTT and others.

Marriage is a sufficient consideration to sustain a contract made in contemplation thereof; and such a contract will be enforced in a court of equity, upon the application of any person within the scope of the consideration.

The mutual stipulations and grants of the parties to an ante-nuptial contract, in favor of each other, are alone sufficient to give validity to the provisions of the instrument.

Where it was stipulated, in an ante-nuptial contract executed in France, that in case of the death of the wife without leaving children, her husband surviving, the real estate of which she should die possessed in the United States, should be immediately sold and the proceeds remitted to her husband; *Held* that this provision operated as a *grant* to the husband, contingent upon the death of the wife, to which effect was to be given upon the principle of equitable conversion.

Held also, that upon the death of the wife without leaving children, the husband became entitled to have her real estate in the state of New-York sold, and the proceeds remitted to him. And the ante-nuptial agreement not having appoint-

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ed a trustee to carry that object into effect, and the heirs at law of the wife being infants, *held further*, that a court of equity had power to appoint a trustee to sell such real estate and remit the proceeds to the husband.

Wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decrees the person in whom it is vested to execute the trust.

If the persons in whom the legal estate is vested are infants, the court will appoint some proper person to execute a conveyance.

A testator devised to his executors all his estate, real and personal, in trust to sell the real estate, except a house and lot in Pearl-street, and a farm. He then gave to his sister-in-law J. C., the mother of his two nieces, during her widowhood, the use of the house and lot in Pearl-street. By the 7th clause of the will it was provided that in case of the death or marriage of J. C. before the nieces should both be married or attain the age of twenty years, they, or in case of the death of either, the survivor, should have the use and occupation of the house and lot in Pearl-street. The 11th clause of the will was as follows: "In case of the death of both of my said nieces, and only one of them shall have lawful issue, I then give, devise and bequeath unto such child or children the whole of my estate, both real and personal; and I hereby require and direct my said executors, if such child or children shall be under the age or ages above mentioned, to apply so much of my estate as may be necessary for their support, maintenance and education; and until the youngest of such children shall become of age, to pay to such as shall have become of age an equal share of the income of my estate, and then to assign and transfer unto such child or children all the money then on hand, and also all the stocks and securities in which any part of my estate may then be invested; and also to release unto such child or children my real estate to which my said executors may have acquired title in the management of my estate or otherwise, in trust for the devisees in this my last will and testament, whether named or not."

Held that J. C. took a life estate in the house and lot in Pearl-street, with a contingent remainder for life, in one half, to each of her daughters. That the contingency having happened, viz. the death of J. C. before the nieces were both married or had attained the age of twenty years, their respective life estates vested.

Held also, that the disposition which the will made of the remainder, after the death of the two nieces, was in contravention of the statute against perpetuities, and was therefore void. And that such remainder, not having been effectually disposed of by the will, vested in the heirs at law of the testator, upon the death of J. C.

IN EQUITY. William Cook died on the 4th of July, 1834, leaving his mother, Candace Cook, and his two nieces, Sara Cook and Jeannette M. Cook, his only heirs at law and next of kin surviving him. By his will, he appointed John Gott, Richard Marvin and John L. Schoolcraft his executors, and de-

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vised to them all his estate, both real and personal; to have and to hold the same in trust, nevertheless, to sell all the real estate, except the house and lot in Pearl-street in the city of Albany, occupied by the testator, and a farm in the county of Otsego; and to invest the proceeds for certain purposes specified in the will. By the *fourth clause* of the will he gave to his sister-in-law, Jennet Cook, the mother of his two nieces, during her widowhood, the use of the house and lot in Pearl-street. By the *seventh clause* of the will it was provided, that in case of the death or marriage of Jennet Cook before the nieces should both be married or attain the age of twenty years, they, or in case of the death of either of them, the survivor, should have the use and occupation of the house and lot in Pearl-street. The *eleventh clause* of the will was as follows: "In case of the death of both of my said nieces, and only one of them shall have lawful issue, I then give, devise and bequeath unto such child or children the whole of my estate, both real and personal; and I hereby require and direct my said executors, if such child or children shall be under the age or ages above mentioned, to apply so much of my estate as may be necessary for their support, maintenance and education; and until the youngest of such children shall become of age, to pay to such as shall have become of age an equal share of the income of my estate, and then to assign and transfer unto such child or children all the money then on hand, and also all the stocks and securities in which any part of my estate may then be invested; and also to release unto such child or children my real estate to which my said executors may have acquired title in the management of my estate or otherwise, in trust for the devisees in this my last will and testament, whether named or not." On the 22d of October, 1834, Sara Cook intermarried with the defendant, John Innes Kane, and on the 28th of September, 1842, she died, leaving two children, William Henry Kane and De Lancey Kane her surviving; Jennet Cook, her mother, died on the 30th of Sept. 1839; Jeannette M. Cook, the other niece, attained the age of twenty-one years on the 8th of January, 1845, and on the 27th of June, 1846, she intermarried with the plaintiff in France.

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Previous to the marriage, an ante-nuptial contract was executed between the parties, in conformity with the laws of France. By this contract it was provided that in case of the death of the wife without leaving children, all her personal estate should become vested in the plaintiff, and the real estate of which she should die seised within the United States should be immediately sold and the price thereof remitted to the plaintiff. She died on the 26th of April, 1847, without having had any child.

The plaintiff filed his bill on the 18th of April, 1848, against John Gott and John L. Schoolcraft, as the surviving executors and trustees under the will of William Cook, deceased; and against John Gott, also, as the general guardian of Jeannette M. Cook, and against William Henry Kane and De Lancey Kane, the children of her deceased sister, and against John Innes Kane, as their guardian. The bill alleged that the plaintiff's wife, at the time of her death, was seised in fee simple in her own right, as a devisee and heir at law of William Cook deceased, of an equal undivided half part of the house and lot in Pearl-street; that she was also seised in fee simple, in her own right, as an heir at law of her father, of an undivided fourth part of a store in Hudson-street, in the city of Albany, and of the undivided half part of 250 acres of land in the county of Herkimer: that Gott and Schoolcraft had in their hands, as trustees under the will, securities amounting to upwards of \$20,000, which belonged to his wife at the time of her death; that Gott, as her guardian, also had in his hands securities amounting to \$6317. The plaintiff claimed and insisted that, under and by virtue of the provisions of the ante-nuptial contract, he was entitled to the whole of the fund in the hands of the trustees, and held by them for his wife at the time of her death, with all the interest and accumulations thereon since her death; also to the moneys and securities in the hands of John Gott, as her guardian, with the interest and accumulations thereon; also that he was entitled to have the real estate, of which she died seised, sold and conveyed by some suitable person to be designated by this court in pursuance of the power, declaration and directions contained in the ante-nuptial contract,

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and to have the proceeds remitted and paid over to him, and prayed for a decree to that effect; and also that the infant children of Sara C. Kane, by their guardian or otherwise, might be required, if necessary, to join in the conveyance.

The defendants Gott and Schoolcraft put in an answer, in which they admitted the facts as stated in the bill, and submitted themselves to the direction of the court in the premises. The defendant John Innes Kane put in a similar answer. The defendants William Henry Kane and De Lancey Kane, by Charles B. Lansing, Esq. their guardian ad litem, put in a general answer. Replications having been filed to the several answers, proofs were taken, and the cause was brought to a hearing upon pleadings and proofs.

J. Rhoades & J. C. Spencer, for the plaintiffs.

W. W. Frothingham & M. T. Reynolds, for guardian of infants Kane, and for John Innes Kane.

J. V. L. Pruyn, for Gott and Schoolcraft.

By the Court, HARRIS, J. It is not denied that Madame de Barante, at the time of her death, was seised in her own right, as an heir at law of her father, of the undivided fourth part of the store in Hudson-street, and the undivided half of the land in Herkimer county; nor is it denied that she was entitled to the funds in the hands of the trustees, under the will, arising from the interest and income of her share of the estate, or to the amount in the hands of her guardian; nor did I understand it to be denied upon the argument that the plaintiff, by virtue of the marriage contract, became entitled to all the personal estate, and the proceeds of the real estate of which his wife, at the time of her death, was the owner. I can see no ground upon which the validity of that contract can be questioned. It seems to have been executed with the solemnities required by the laws of France; it was executed in reference to the marriage of the parties, which took place two days thereafter. This alone would constitute a sufficient consideration to sustain the con-

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tract. "Marriage," says Chancellor Kent, in *Sterry v. Arden*, (1 *John. Ch.* 271,) "has always been held to be the highest consideration in law." Such a contract will be enforced in a court of equity upon the application of any person within the scope of the consideration of the marriage; (2 *Story's Eq.* § 986;) and besides, as was well said by the plaintiff's counsel upon the argument, the mutual stipulations and grants of the parties in favor of each other, are alone sufficient to give validity to the provisions of the instrument.

I also agree with the plaintiff's counsel in the effect to be given to the tenth clause of the contract, whereby it is stipulated, that in case of the death of the wife without leaving children, her husband surviving, the real estate of which she should die possessed in the United States, should be immediately sold, and the proceeds remitted to her husband. This provision operated as a grant to the husband, contingent upon the event which has happened. The manner in which effect is to be given to the grant is defined; the real estate is to be immediately sold, and the proceeds remitted to the husband. It is a maxim in equity, acting upon the principle of equitable conversion, that whatever is agreed to be done, if the execution of the agreement would be lawful and just, shall be considered as done. See 2 *Kent's Com.* 5th ed, 230, note a, where numerous authorities sustaining and illustrating this principle are collected. It is upon this principle that where land is contracted to be sold, in the lifetime of the owner, it will, after his death, though not conveyed, be regarded as personal estate. Indeed, there is no principle of equity, which has a more extensive or varied application. The disposition of a portion of the very estate to which this suit relates, has been controlled by the application of this principle. (*Gott v. Cook*, 7 *Paige*, 534.)

The case of *Craig v. Leslie*, (3 *Wheaton*, 563,) cited by the plaintiff's counsel, is very much in point upon this branch of the case. Robert Craig, a citizen of Virginia, had made a will, devising to Leslie and four others all his estate, real and personal, in special trust to sell the same, and then bequeathed to his brother, Thomas Craig of Ayrshire, Scotland, the proceeds of

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his estate, real and personal, so directed to be sold, to be remitted to him as payments were made. The question certified from the circuit court was, whether the legacy given to Thomas Craig, an alien, was to be considered as a devise, which he could take only for the benefit of the commonwealth, and could not hold; or a bequest of a personal chattel, which he could take for his own benefit. An admirable opinion was delivered by Mr. Justice Washington, in which the whole court concurred, wherein he comes to the conclusion that the legacy to Thomas Craig was to be considered as a bequest of personal estate, which he was capable of holding for his own benefit. 'The principle upon which the whole of this doctrine of equitable conversion is founded,' he says, "is that a court of equity, regarding the substance and not the mere forms and circumstances of agreements, and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance." I can not doubt that the principle, thus clearly stated, embraces the case under consideration.

Assuming, then, that upon the death of Madame de Barante, her husband became entitled to have her real estate sold, and the proceeds remitted to him, the next question presented by the case is, whether this right can be enforced, and if it can, by what means. If the instrument which created this right in the plaintiff had also appointed a trustee to carry into effect the object, as in the case of *Craig v. Leslie*, no one, I apprehend, would have doubted the authority or the duty of such trustee to sell the real estate and remit the proceeds; but, it is a rule of equity, which is said to admit of no exception, *that it never wants a trustee*. It is the settled doctrine in equity that no trust shall be permitted to fail for the want of a trustee to execute it. Land to which a trust is attached remains chargeable with such trust in the hands of the heir or devisee. A court of equity will always establish and enforce a trust whenever a competent party applies for its aid, and presents a case entitling him to relief. "This principle," said Chancellor Jones, in *McCarter v. Orphan Asylum Society*, (9 Cowen, 437,) "partakes

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largely of the true spirit of equity, and may justly be said to rank with the fairest features of the system." The general rule as stated by *Story*, (2 *Eq. Jur.* § 976,) is that wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. Upon this principle it was held, in *Benthorn v. Wittshire*, (4 *Madd.* 44,) where estates had been directed to be sold and the proceeds divided among children, without appointing any person to make the sale, that the heir should execute the conveyance. In a similar case, *Patton v. Randall*, (1 *Jac. & Walker*, 194,) the devisees were directed to make the sale. But as in this case the heirs at law are infants, some person should be appointed by the court to execute a conveyance. It is within the provisions of the statute, in relation to the conveyance of lands by infants. (2 *R. S.* 194, § 167.)

The only question that remains relates to the house and lot in Pearl-street. On behalf of the children of Mr. Kane, it is insisted that, by the *eleventh clause* of the will, this house and lot, upon the death of Madame de Barante, leaving no lawful issue, became vested in them. On the other hand, the counsel for the plaintiff insists that, under the *seventh clause* of the will, upon the death of Mrs. Cook, before both her daughters had married or attained the age of twenty years, the absolute ownership of the house and lot vested in them as tenants in common; and secondly, if, under the operation of the seventh clause of the will, Madame de Barante did not acquire title to the undivided half of the house and lot in question in fee simple, and though it may have been intended that the *eleventh clause* of the will should apply to the house and lot in Pearl-street, yet that clause cannot have the effect to vest any title in the children of Mrs. Kane by reason of the illegal limitation upon the power of alienation contained in that clause. These questions I proceed to consider.

The leading object of the testator obviously was, to keep the principal of his estate together until the death of both his nieces,

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and then to distribute it among their descendants. To effect this, his design was to vest the title to the whole in his executors and trustees : accordingly, he commences by giving, devising and bequeathing to them, all his estate, real and personal, of what nature soever, or wheresoever situate. But the chief objects of his munificence were infants, and while he would preserve his estate unbroken, he was also desirous of making suitable provisions for them during their minority. To this end he gave to their mother the use of his dwelling house during her widowhood, and an annuity of \$2000, for the support of herself and her family ; contemplating also, the event of her death, while her daughters were yet too young to provide for themselves, he directed that in that event, they or the survivor of them, in case of the death of either, should have the use and occupation of his dwelling house ; in that event, too, his mother, if living, was to reside with them in his dwelling house. If his mother should not be living, other provision was made for the care and education of the nieces until one of them should be married, or both should attain the age of twenty years. The intention of the testator undoubtedly was to vest the title to his dwelling house in his executors, and to secure to his nieces a home there, until they should become entitled to the income of his estate. If their mother should live, unmarried, until that time, the dwelling house, upon her death would revert to the executors, to be disposed of by them, like the other property of the estate, for the general purposes of the will ; but in case the mother should die or re-marry before the daughters should both come into possession of the income of the estate, then they were to have the use and occupation of the dwelling house instead of their mother. How long they were to enjoy it does not appear from the will. There is some reason to believe that the testator only intended that this arrangement should continue until his nieces should be entitled to the income of his estate. Then they would possess ample ability to make such arrangements for themselves as might suit their own taste and inclination. But perhaps the fair construction of the provision is, that having once become entitled to the use of the dwelling house, they

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should not be disturbed in that use during their lives. It was further provided, that in case of the death of either, the survivor should enjoy the use of the dwelling house to the same extent as both, while living, were entitled to enjoy it. As the nieces should respectively marry, or attain the age of twenty, they were to come into the full enjoyment of the entire income of the estate. These are the general purposes of the testator manifest upon the face of the will, in respect to his nieces, while living.

The legal effect of these provisions, so far as they relate to the house and lot in Pearl-street, is next to be considered. It has already been adjudged that "*the executors, as trustees, took no estate or interest whatever in the house and lot in Pearl-street, but that the whole beneficial interests devised, so far as the devise of an estate or interest in the house and lot was legal, passed directly to the persons for whose benefit the same were intended as legal estates.*" This was undoubtedly the effect of the 47th section of the article of the revised statutes relative to uses and trusts, upon this part of the will. Mrs. Cook, the sister-in-law of the testator, then, took a life estate in the house and lot, subject to a contingency which did not happen. She having died before her daughters were both married or had both attained the age of twenty, they became, under the seventh clause of the will, as controlled by the statute referred to, entitled to a legal estate of the same extent and duration as the beneficial use which it was the intention of the testator to secure to them. Upon the argument of the cause, when this will was brought before the court, for the purpose of settling the construction to be given to its various provisions, it was assumed by all the counsel, that the nieces, upon the death of their mother, took, each of them, a life estate in one half of the house and lot. I think this is the true construction of the provision of the will in this respect; and if it be so, it follows that, upon the death of Mrs. Kane, the period for which the power of alienation in respect to her half of the house and lot could be suspended, expired. An absolute ownership must have vested somewhere, immediately, so that an absolute estate in fee in possession could at once be conveyed; and so, also, in respect to the other half,

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upon the death of Madame de Barante. But by the terms of the *tenth* and *eleventh* clauses of the will, such an absolute ownership could only vest upon the death of both nieces. It could not be determined who would be entitled to such ownership, until that event happened. The property was devised to the children of the two nieces. Who the persons thus made devisees were to be, could only be known upon the death of the surviving niece. Until that time, if the devise was to take effect, a fee in Mrs. Kane's half of the house and lot could not be conveyed. But this is a violation of the statute against perpetuities. The remainder thus sought to be vested in the children of both nieces, under the provisions of the tenth clause of the will, or, of one of the nieces, under the eleventh clause of the will, being therefore void, the whole estate in Mrs. Kane's half of the house and lot, at her death, went to the heirs at law of the testator. Nor would the result be different if the seventh clause of the will should be construed as intended to vest in Madame de Barante, upon the death of her sister, an estate in remainder for life in her half of the dwelling house. Such an estate would be void, (1 R. S. 723, § 17,) but the ultimate remainder in fee could not take effect, for the contingency had not yet happened which was to determine in whom such remainder was to vest. My conclusion, therefore, is that, in respect to the half of the house and lot in Pearl-street, in which Mrs. Kane held a life estate, under the seventh clause of the will, her children and her sister, as the heirs at law of the testator, became vested with an absolute ownership, immediately upon her death.

But Madame de Barante *might* have died before Mrs. Kane. In that event, it is obvious that the vesting of the remainder in her half of the house and lot must have been suspended, by the terms of the devise, until the death of Mrs. Kane. There would then have been no ascertained person to take the remainder in her half any more than there was to take the remainder in Mrs. Kane's half when she died. The only difference between the two cases is, that what, at the time of making the devise, was a *possibility* in respect to each half, actually

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happened in respect to Mrs. Kane's half. The death of Mrs. Kane served to reveal the latent vice which equally infected both devises. The devises were either valid or void *in their creation*. And whether valid or void, depended upon the question whether a contingency might happen which would suspend the power of alienation beyond the period limited by statute. We have seen that such a contingency *did happen* in respect to Mrs. Kane's half, and that it *might have happened* in respect to the other half. It was held in the case of the James will, (16 Wend., 171,) that the suspense of alienation must be so limited in point of duration, that it *can not, in any event*, exceed two lives; otherwise it is void *in its creation*. "The question is not," says Justice Bronson, "whether the trust *probably will*, but whether it *can*, transgress the statute rules."

This, then, is the result of my examination. Mrs. Jennet Cook took a life estate in the whole of the house and lot with a contingent remainder for life in one half to each of her daughters. The contingency happened, and their respective life estates vested. It was not intended to vest any legal estate in Mrs. Cook or the nieces, but such estates resulted from the operation of the statute upon the provisions of the will. It can not, therefore, be inferred that the testator intended to give his nieces any more than a life estate in the house and lot. The disposition which the will made of the remainder after the death of the two nieces, was in contravention of the statute against perpetuities, and was, therefore, void. Such remainder, not having been effectually disposed of by the will, vested in the heirs at law of the testator upon her death.

A decree must be entered declaring the rights of the parties upon the principles above stated. It may also be referred to some proper person, as referee, to sell and convey the real estate of which Madame de Barante died seised, with directions to pay the proceeds, after deducting proper charges, to the plaintiff or his attorney. The trustees under the will, and the guardian of Madame de Barante, should also be directed to pay over to the plaintiff or his attorney, the several amounts in their hands

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respectively belonging to her estate. Suitable directions may be inserted in the decree for carrying these provisions into effect.

The defendants Gott and Schoolcraft, and the infant defendants William Henry Kane and De Lancey Kane, are respectively entitled to their costs. As between the plaintiff and John Innes Kane, neither is to have costs against the other.

TOMPKINS GENERAL TERM, July, 1849. *H. Gray, Mason, and Morehouse*, Justices.

CARRUTH vs. CHURCH.

Where an action, brought since the revised statutes, is instituted by *capias*, the suit is not considered as commenced until the *issuing* and *service* of the *capias*. Consequently, to charge a sheriff, in an action of debt for an escape, the writ must be actually *served* upon him while the debtor is off the limits.

MOTION for a new trial. The action was debt against a sheriff, for an escape. The plaintiff proved, upon the trial, the issuing, but not the service, of the *capias* against the sheriff, while the debtor was off the jail limits. The judge decided that it was necessary to prove not only the issuing of the writ, but the service thereof upon the sheriff, during the debtor's absence from the limits; and nonsuited the plaintiff. The plaintiff excepted, and now moved for a new trial.

M. D. Carr, for the plaintiff.

S. S. Merritt, for the defendant.

By the Court, MASON, J. The first question which I propose to consider in this case, is whether the judge ruled correctly in holding that the *capias ad respondendum* should actually have

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been served on the sheriff while the debtor Ecclestone was off the jail limits. The rule was well settled, before the revised statutes, by a long series of adjudications, that the issuing of the *capias* was, for every material purpose, the commencement of the action. (1 *Caines*, 69. 2 *John*. 346. 3 *Id.* 42. 3 *Caines*, 77. 3 *John*. Ch. 145. 10 *John*. 119. 4 *Cowen*, 158. 8 *Id.* 203. 4 *Id.* 161. 18 *John*. 496. 17 *Id.* 63.) The decisions, however, have not been entirely uniform as to what should be deemed the issuing of the *capias*. While in one case it was held that the delivery of the *capias* to the coroner's wife was a good commencement of the suit, in another case it was adjudged that nothing short of the actual delivery of the writ to the coroner was a good commencement. And in a still later case than either it was decided that the delivery of the writ to a messenger to carry to the coroner, to be served on the sheriff, in an action for an escape of a prisoner from the limits, is the commencement of the suit, and if at that moment the prisoner be off the limits the plaintiff is entitled to recover for the escape. These were all adjudications in suits arising before the revision of 1830; and while the courts recognized the rule that the actual issuing of the *capias* was the commencement of the suit, the decisions were not uniform as to what should be deemed the issuing of the *capias*. And perhaps to this seeming confusion in the decisions as to what should be deemed the commencement of the suit is to be attributed the particular language of our present statute. (2 *R. S.* 347, § 1.) That statute is as follows: "Actions brought for the recovery of any debt, or for damages only, may be commenced either, First, by the issuing and service of a *capias ad respondendum* against persons not privileged from arrest." And then the statute provides for the commencement of suits by summons and declaration. Whatever may have been the motive which induced the change, I think this statute was designed to define what should be deemed the commencement of the suit, as well as the mode in which it should be commenced. This has been the uniform construction which has been given to it by the courts. This was so adjudged in reference to the third subdivision of this section, in

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the case of *Edmonstone v. Thomson*, (15 *Wend.* 554,) and again affirmed in the case of *Johnson v. Comstock*, (6 *Hill*, 10,) and also in the case of *Brown v. Ferguson*, (2 *Denio*, 196.) In the case of *Johnson v. Comstock*, Judge Bronson uses the following language: "The case of *Carpenter v. Butterfield*, (3 *John.* 145,) only decides that when the plaintiff proceeds by capias the suit is commenced when the writ is delivered to the proper officer;" and then adds, "but that is no longer the general rule. Service as well as the issuing of the capias is now necessary to the commencement of the suit, [citing this very statute, 2 *R. S.* 347, § 1,] except when the question is on the statute of limitations. (*Id.* 299, § 38.)" And this, it seems to me, is the only construction which it is possible to give this statute. It is not the province of the courts to legislate and repeal a part of this statute by adjudging that suits may be commenced by the mere issuing of a capias, when the legislature has said that the issuing and service of the capias shall be deemed the commencement of the suit. It was said by the counsel for the plaintiff, that it never could have been the intention of the legislature, by this statute, to provide that the actual service of the capias should be necessary to the commencement of the suit. It is impossible for us to say what the legislature intended, except from what they have done and said. They have said suits may be commenced by the issuing and service of a capias; and there is no ambiguity in their language. There was no statute in this state, prior to the one under consideration, declaring what should be deemed the commencement of a suit by capias; and, as we have already seen, the courts were not very successful in defining precisely what should be deemed the commencement of a suit by capias. While the principle was declared, that the issuing of the capias should be deemed the commencement of the suit, there was much contrariety of opinion amongst judges, as to what should be deemed the issuing of the capias, for the purposes of the commencement. It cannot be denied that this construction of the statute will produce great inconvenience, if not work the utter impossibility of reaching the sheriff in many cases of escape; but the argument "*ab inconvenienti*" can not

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prevail and so far operate as a repeal of this statute as to justify this court in adjudging that suits may be commenced by the issuing of a *capias*. It is a familiar rule that mere reasons of public convenience, or presumed or probable legislative intent, can not, as a general rule, have the force to set aside the plain words of a statute. (26 *Wend.* 462. 2 *Barb. Sup. Court Rep.* 111, 112.) The judge decided correctly in nonsuiting the plaintiff, for the last reason assigned by him. It is unnecessary, therefore, to consider the other reasons assigned, and a new trial is denied.

SAME TERM. *Before the same Justices.*

VAN WYCK vs. ALLIGER.

Under a contract for the sale and purchase of land, by which time is given for the payment of the purchase money, and the purchaser is to have the possession of the premises in the meantime, the purchaser is, in equity, deemed the owner of the premises, having the same rights as a mortgagor in possession; and the vendor stands in the situation of an equitable mortgagee.

And the court will not restrain the purchaser, by injunction, from committing waste, by cutting timber upon the land; unless he does so to such an extent as to render the land an inadequate security for the unpaid purchase money.

The court will not grant an injunction to prevent the cutting of timber, by the purchaser, where it was stipulated in the contract of sale, that he should have the privilege of converting the timber upon the premises into lumber, for the payment of the purchase money, and there is no allegation in the bill, nor proof, that the land would not be an adequate security for the payment of the purchase money, without the timber.

As a general rule, a court of equity will only interfere by injunction to prevent future waste. It will not grant an injunction against the removal of timber already cut.

IN EQUITY. This was a bill filed by the plaintiff to restrain the defendant, by injunction, from the commission of waste. The plaintiff was the vendor and the defendant the vendee of premises, in the possession of the latter under a con-

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tract of sale. The other facts in the case sufficiently appear in the opinion of the court. The cause was brought to a hearing upon pleadings and proofs.

J. Thompson, for the plaintiff.

I. Hardenburgh, for the defendant.

By the Court, MASON, J. The common law doctrine of the courts, in regard to waste, was most elaborately and learnedly discussed by Lord Chief Justice Eyre, in the case of *Jefferson v. The Bishop of Durham and others*, (1 Bos. & Pull. 120.) At common law, said he, the proceeding in waste was by writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the parties. If that writ was obeyed, the ends of justice were answered. But if that was not obeyed, and an alias and pluries produced no effect, then came the original writ of attachment, returnable in a common law court, which was considered the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment which was and is the foundation of all proceedings in prohibition. That writ being returnable in a common law court, on the defendant's appearing, the plaintiff counted against him, and he pleaded, and the question was tried, and if the defendant was found guilty, the plaintiff recovered single damages for the waste committed. This remedy, at common law, was somewhat extended by the statutes of Marlbridge and Gloucester; the latter of which gave a writ of waste or estrepement *pendente lite*. Then came the statute of Westminster the second, which took away the writ of prohibition entirely and gave the summons in its stead. This was the common remedy, with the writ of prohibition abolished, and the summons in its place with the judicial writ of estrepement given *pendente lite*. There was, however, in real actions by the common law, another remedy of a preventive nature in the writ of estrepement, which followed the judgment in the real action. The writ went to the sheriff after the judg-

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ment and before possession was delivered by the sheriff, to prevent the commission of waste on the lands recovered ; and subsequently, when the proceeding by ejectment became the usual mode of trying the title to land, as the writ of estrepement did not apply, courts of equity, for the purpose of preserving the property *pendente lite*, supplied the defect by allowing the writ of injunction to issue. The courts of equity, however, have not stopped here. They have often interfered in restraining waste by persons having limited interests in property, on the mere ground of the poverty of the common law in affording an immediate remedy for the preservation of the property from irreparable injury or destruction. And the courts of equity have extended this salutary relief to remedies in many cases where the common law remedies could not be made to apply. Such is the relief granted on a bill *quia timet*, which is allowed even when no waste has been committed, but is only meditated or feared. The bill in equity *quia timet* is in the nature of a writ of prevention, to accomplish the ends of precautionary justice. The remedy of this bill is ordinarily applied to the prevention of anticipated wrongs or mischiefs, and not merely to redress them when done. (2 *Story's Eq. Jur.* § 826.) It is said by the learned Justice Story in his Equity Jurisprudence, (2 *Vol. p.* 170, § 826,) speaking of the bill *quia timet* ; "The party seeks the aid of a court of equity because he fears (*quia timet*) some future probable injury to his rights or interests ; and not because an injury has already occurred which requires any compensation or other relief." This bill is the appropriate remedy to restrain the commission of waste, by injunction, and lies in all cases where a party shows a case which entitles him to this equitable relief. It becomes important, in determining the rights of the parties in this case, to inquire in the first instance in what relation precisely we are to regard these parties as standing to the land in question. It appears, both from the pleadings and the evidence in the case, that on the 29th day of March, 1843, the plaintiff, by his agent Donaldson, entered into a written contract for the sale of the premises to the defendant. The defendant agreed to pay the plaintiff for the premises,

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\$3000, to be paid in lumber; interest to be paid only on \$2500 of it; three hundred dollars to be paid the first year with interest; the balance to be paid in six equal annual payments with interest; the lumber to be delivered from the spring of the year to the last run of boats in the fall, at Poughkeepsie or New Hamburg. The defendant went into the possession of the premises under this contract, as the agent Donaldson swears, about the first of May, 1843. He says that, "it was understood between the defendant and myself, acting as agent for the plaintiff, that the defendant should have possession of the premises under this article." I am satisfied from the nature of this agreement between these parties, the situation of the property itself, and the defendant's situation, and from the testimony in the case, that it was understood that the defendant should have the privilege of paying for this place, by converting the timber upon the premises into lumber, and delivering it to the plaintiff, at the places named in the contract, in payments upon the contract. There is over two hundred acres of the land, about one hundred acres of which is covered by water. There was a saw-mill in operation upon the premises, at the time of the sale, and the defendant went on for four or five years, cutting the timber upon the lot, with the full knowledge of the plaintiff, and converting the same into lumber, and making payments to the plaintiff in the meantime, upon his contract, to the amount of about \$1600; and so far as appears from the evidence in the case, there was not one word of complaint from the plaintiff as to his right to do so.

The plaintiff claims that the defendant had forfeited the contract, by not keeping up the payments, and that an end had been put to this contract by the parties. I have looked carefully into the evidence in the case, and it fails entirely to show any such thing. It is undoubtedly true, from the evidence, that the defendant failed to make his payments, and the plaintiff therefore had a right to elect to consider the contract forfeited, and bring ejectment and put the defendant out of possession. And unless he did elect to consider the contract forfeited, the defendant was fully justified in holding under it; and it remains to

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all intents and purposes, a valid contract, until the plaintiff has disaffirmed it. It is true, the plaintiff's son swears that in January, 1848, he went with his father to see the defendant, and that the defendant told the plaintiff he could not pay him any thing; that he was poor, and not able to pay him any thing, and then stated to the plaintiff that he must take the place back; and that to this the plaintiff made no reply.

There is nothing in the evidence which shows that the parties have ever put an end to this contract. It is not important for us to inquire what are the legal rights of these parties under this state of things. The plaintiff has come into a court of equity and submitted his case to the equitable jurisdiction of the court, and he must be satisfied with the determination of his case upon the principles which courts of equity have applied to similar cases.

Under the rule which obtains in courts of equity the defendant, by the contract of sale, is deemed the equitable owner of the premises, and the plaintiff stands in the situation of an equitable mortgagee. (6 *Ves.* 349, note a. 15 *Id.* 138. 2 *Story's Eq. Jur.* p. 628, §§ 789, 790, 1212. 6 *John. Ch. Rep.* 403. 3 *Id.* 316. 1 *Barb. Sup. Court Rep.* 495. *Edgerton v. Peckham*, 11 *Paige*, 359.) Now it is a familiar rule in equity, that a mortgagor in possession has the right to cut timber; and a court of equity will not interfere to restrain him in the exercise of that right, until it is made to appear to the court that he is cutting to an extent calculated to render the land an incompetent security for the amount due upon the mortgage. (2 *Story's Eq. Juris.* § 915. *Brady v. Waldrons*, 2 *John. Ch. Rep.* 148. 8 *Ves.* 105, note 1. *Hoppesley v. Spencer*, 5 *Madd.* 422. *Farrant v. Lovell*, 3 *Atk.* 723. *Wright v. Atkins*, 1 *Ves. & Bea.* 314. *Scott v. Wharton*, 2 *Hen. & Munf.* 25.) I know there are some cases which hold that the whole estate is security for the mortgage debt, and that the courts should therefore interfere by injunction to restrain all waste, without reference to the question whether the acts were calculated to impair the security or not. I am not prepared to recognize the doctrine con-

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tained in these cases, and the doctrine has been repudiated in most of the cases cited above.

In *Cox v. Goodfellow*, which was the case of a bill against the assignees under a commission of bankruptcy against the mortgagor, for a foreclosure and an injunction against cutting timber, the vice chancellor refused the injunction, stating that the rule had been settled by the lord chancellor and himself that an injunction should not be granted in such a case, unless the mortgagee showed that the security would be so reduced by the waste as to render it an inadequate security. (8 *Vesey*, 105, *Sumner's ed. note 1.*) The same doctrine was affirmed in the case of *Hoppesley v. Spencer*, (5 *Madd.* 422.) The same principle is laid down in the broadest terms in *Scott v. Wharton*, (2 *Hen. & Munf.* 25,) in which case it is expressly adjudged that an injunction to stay waste ought not to be granted to a vendor against a vendee to whom he has sold a tract of land in fee simple, retaining the title as a security for the purchase money; unless he brings his suit to subject the land to the payment of the purchase money and charges the defendant with cutting and selling timber in a manner calculated to render the land an incompetent security; in which case an injunction to stay waste may be awarded.

The same doctrine was again affirmed on a bill filed by the mortgagee against the mortgagor, to restrain waste, in the case of *King v. Smith* (2 *Hare's R.* 239.) This case is cited by the learned Justice Story in his Commentaries on Equity Jurisprudence, 2 vol. page 246, § 915. Story lays down the rule in these words: "If the mortgagor in possession should fell timber on the estate and thereby the security would become insufficient, (but not otherwise) a court of equity will restrain the mortgagor by injunction." (2 *Story's Eq. Juris.* § 915.) This, it seems to me, is the reasonable rule, and as far as a court of equity should go in such cases. The doctrine that the whole estate is pledged by the mortgage, as security for the mortgage debt, is all true. The mortgagee's interest, however, is but a chattel interest, even after forfeiture. (2 *Barb. Ch. Rep.* 134, 5.) The land, in equity, belongs to the mortgagor; and it seems to

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me that courts of equity will do their whole duty when they fully protect this chattel interest of the mortgagee by saying to the mortgagor, "you shall do nothing calculated to impair the security; with this exception you may commit all the waste upon the land you please, for it is your own." I can never assent to the issuing of an injunction in behalf of a mortgagee, in such a case, unless he shows that it is necessary to preserve his security. If this doctrine—that the land is a security for the mortgage debt, and as the whole estate is a security, the court should enjoin any cutting of timber or other waste, without reference to the sufficiency or insufficiency of the security—is to prevail, great wrongs could be perpetrated under the rule. Suppose A. has a mortgage of \$300 upon timbered land belonging to B. worth as many thousand dollars, and B. goes on to cut timber and clears the land, without any design or even probability of impairing A.'s security, still he shall be enjoined if the doctrine of some of these cases is to be sustained. I am not prepared to sanction such a doctrine. The same rule in equity, as we have already seen, prevails in this case as would govern on a bill filed by a mortgagee against a mortgagor in possession. In equity the purchaser is owner of the land, but the land is a security for the payment of the purchase money, and one which it is the duty of courts to protect. That they will faithfully do by enjoining all waste calculated to impair its value; and it seems to me that they will subserve the purposes of equity much better if they stop there. In the case under consideration, there is not a single allegation in the bill charging that the land is not an adequate security, with all the timber off, for the purchase money remaining due upon the contract of purchase; and the proof fails to show such a case.

But again; this is a bill *quia timet*; a bill by which the party obtains the injunction because he fears some present or future injury to his rights or property, and not because an injury has been done. Now there is not a single pretended act of waste shown by the evidence in this case to have been committed within a year of the time of the filing of this bill; and there are no threats or probable grounds shown in the evidence

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to induce the belief that the defendant will commit waste hereafter. Some of the witnesses say that there is not \$50 worth of timber upon the whole two hundred acres, and as to the four hundred logs which were cut in the spring of 1847, more than a year before the filing of the bill in this case, they lie there still, upon the premises. The plaintiff has prayed in his bill that the defendant be restrained from interfering with, or in any way removing, these same logs. This part of the relief we can not grant. This court will not grant an injunction barely to prevent the removal of timber which has been unlawfully cut. (*Watson v. Hunter and others*, 5 *John. Ch. Rep.* 169, and *cases there cited*. 3 *Paige*, 259.) As a general rule a court of equity will only interfere by injunction to stay future waste. The remedy of accounting for waste already committed is merely incidental to the jurisdiction to prevent future waste, assumed to prevent multiplicity of suits and to save the party the necessity of resorting to trover at law. (2 *John. Ch. Rep.* 170.) There is a very good reason why a court of equity should not sustain a bill solely to enjoin the removal of timber already cut. The timber, when cut into logs, ceases to be a part of the realty, is converted into personal property, and trover will lie for it. The plaintiff has a perfect remedy in an action at law to recover the value of these logs, if the defendant had no right to cut them; and if he had, then the defendant ought not to be enjoined.

But again; if we were of the opinion that this bill ought to be sustained to prevent future waste, I do not see how we could give an account of, and satisfaction for, waste already committed, as there is no prayer in the bill for an account of the waste already committed. I have looked very carefully into the books, and have not been able to find a single case in which an accounting for waste committed has ever been decreed unless the relief was sought by the prayer of the bill. (*See Eden on Inj.* 244 to 249.)

At the time of the filing of the bill in this case an injunction was issued, and upon the coming in of the answer, the court dissolved the injunction, and the plaintiff asks the court to re-

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vive the injunction and make it perpetual. This, it seems to me, it should not do, upon the case made by the pleadings and the proofs, for the reasons above stated. The plaintiff has failed to make out a case entitling him to the equitable relief sought by his bill, and has compelled the defendant to litigate the case with him, and I think the bill should be dismissed with costs to the defendant. The decree will therefore be, that the plaintiff's bill be dismissed with costs, but without prejudice to the plaintiff's rights in any action at law.

Decree accordingly.

CLINTON GENERAL TERM, July, 1849. *Paige, Willard, and Hand*, Justices.

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A judgment for the plaintiff in an action of trespass *quare clausum fregit*, in which the defendant pleaded *liberum tenementum*, is a bar to an ejectment for the same premises, or a portion thereof, subsequently brought by the defendant in the former suit against a person deriving his title to the land through the plaintiff in that suit.

And if the defendant in the second suit proves that the conveyances under which he claims include the land described in the declaration in the first suit, or purport to convey all the right which the plaintiff in the former suit had, at the time of commencing that suit; and that the land for which the ejectment suit was brought is a portion of that described in such declaration, the record of the judgment in the former suit is *prima facie* evidence that the title to the land for which the ejectment suit was brought was in controversy in the former suit, and was found not to be in the plaintiff in the ejectment suit.

If it be proved that the land in controversy in the ejectment suit is the same land for trespasses upon which the former suit was brought, and recovery had, such record will be conclusive.

In an action of trespass *quare clausum fregit*, where the defendant pleads *liberum tenementum*, the plaintiff will recover if he shows a trespass committed on any part of the close described in the declaration, to which the defendant does not show title. And the defendant, although he has pleaded title to the whole,

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will succeed if he shows title to that part upon which he has trespassed; notwithstanding he has no title to the remainder of the close. *Per HAND, J.*

And if the plaintiff shows trespasses on different parts, and the defendant proves title to some of them, the defendant will have judgment as to those parts to which he has title, and the plaintiff as to the others. *Per HAND, J.*

The plaintiff is not bound to show a trespass upon the whole premises, nor the defendant that he has title to the whole, in order to succeed; but each may succeed *pro tanto*, according to the proof. *Per HAND, J.*

If but one close is set out and described in the declaration, and judgment passes against the defendant upon the single plea of *liberum tenementum*, the record is *prima facie* evidence of title in the plaintiff.

The verdict of a jury upon title, in trespass, not only operates as a bar to the future recovery of damages for a trespass, founded upon the same injury, but operates also as an estoppel to any action for an injury to the same supposed right of possession. *Per WILLARD, J.*

As the former judgment can not be pleaded by way of estoppel, in an ejectment suit, the defendant is entitled to avail himself of it as evidence under the general issue. And when evidence of a former recovery is thus introduced, it is as conclusive as though the matter had been specially pleaded by way of estoppel. *Per WILLARD, J.*

The record must show that the same matter might have come in question on the former trial, and then the fact that it did come in question, may be shown by proof *aliunde*.

THIS was a motion, by the defendant, for a new trial, on a bill of exceptions. The action was ejectment, and was tried before the Hon. Ira Harris, justice, at the Montgomery circuit. The cause had been once tried previously, and a new trial granted. The plaintiff sought to recover seven acres of land described as the northeast corner of lot No. 10 in a patent of land granted to Brodt and Livingston. The plaintiff gave in evidence letters patent to Brodt and Livingston, granted in 1738, for premises described in the bill of exceptions as follows: "Situate in the town of Canajoharie and begins at the south branch of the Mohawk river at the most southerly corner of a tract of land formerly granted to James Alexander, Lewis Morris and Cadwallader Colden and others, and runs along the line of the said land south 30 deg. west 244 chains to two lime trees growing from one root, of which one is marked V. S. on the south side thereof, and with three notches on the other three sides, being marked for the westernmost corner of the land granted to James Alexander and others; then along the lines of the land

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granted to Elizabeth Colden, N. 32 deg. 30 min. W. 58 ch. to a large maple tree marked with three notches on three sides, and a smaller one growing out of the same root with three notches on one side, there being an iron-wood tree and a spruce tree near the same place each marked with three notches on four sides—and S. 59 deg. W. 126 ch. and N. 72 deg. W. 45 chains and 2 rods to the land formerly granted to Alex'r Colden, then along his lines N. 40 deg. east 162 ch. to a large beech tree and a smaller and a maple sapling, all marked with 3 notches on 4 sides, and N. 32 deg. 30 min. W. 56 ch. then N. 75 deg. 30 min. E. 7 ch. to a large black oak tree, an iron-wood sapling and a maple sapling, each marked with notches on four sides for the S. W. corner of the land formerly granted to Belger Bleeker and others; then continuing the same course along the line N. 75 deg. 30 min. E. 220 ch. to the Mohawk river; and then down the stream of the said river to the place where the tract begun, containing 3200 acres of land." The plaintiff then gave in evidence a deed from Brodt and Livingston to H. Freye of their patent, dated April 5, 1760, the description of the land being the same as in the original patent. Also a warranty deed of lot No. 10 of the patent, from Freye to A. Medler, describing said lot as follows: "All that certain lot or parcel of land situate, lying and being in the county of Montgomery, on the south side of the Mohawk river, in a patent granted to Philip Livingston and others, and is known by the name of lot No. 10, begins at the S. E. corner of lot No. 9, being a hemlock stake standing south 17 degrees W. 17 links from a rock maple tree cornered and marked No. 10 A. M. on the E. side and 9 on the W. side thereof, and runs thence as the needle now points N. 37 deg. and 30 min. E. 57 chains to a hemlock stake; thence 32 deg. 30 min. E. to the line of a patent granted to James Alexander; thence along the said line S. 30 deg. W. to two lime trees growing from one root; thence N. 32 deg. 30 min. W. to the place of beginning, estimated to contain 100 acres, be the same more or less." Also another warranty deed from Medler to Peter Dunckle, jun. dated June 5, 1797, of lot in Livingston and others' patent, described as follows: "known by lot No. 10, begins at

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the S. E. corner of No. 9, being a hemlock stake standing S. 17 deg. W. 17 links from a rock maple cornered and marked No. 10 A. M. on the east side and 9 on the W. side thereof, and runs from thence as the needle pointed in 1793, N. 57 deg. 30 min. E. 57 chains to hemlock tree, thence S. 32 deg. 30 min. E. to the line of a patent granted to James Alexander, thence along the said line S. 30 deg. W. to two lime trees growing from one root; thence N. 32 deg. 30 min. W. to the place of beginning, estimated at 100 acres, be the same more or less." The plaintiff also proved the will of P. Dunkle, jr. devising to the plaintiff that portion of this 100 acres which would cover the land in question, if within Brodt and Livingston's patent. He also introduced several witnesses for the purpose of showing that the true east line of Brodt and Livingston's patent would include this land. After a motion for a nonsuit had been denied, the defendant introduced in evidence a record of judgment in favor of Samuel Jackson against Adam Dunkle in an action of trespass. The memorandum was of July term, 1833, and judgment was signed January 24, 1834. All farther in relation to that suit necessary in this case will be found in the opinion of the court. The defendant also gave in evidence a deed from Samuel Jackson to P. Roof, dated July 30, 1835, and from P. Roof to himself, dated November 1, 1843, and called witnesses for the purpose of showing that the land described in the declaration in said record between Jackson and Dunkle, and also described in those two deeds, included the seven acres for which this action was brought. By the exemplification of the grants it appeared that two patents had issued to Alexander, Morris and others. The lands granted were contiguous to each other, and the one next to Brodt and Livingston's patent was granted in 1723, and was bounded on and recited the former one to the same parties, and made up a deficiency therein. The boundaries were described by courses and distances, and no monuments given, except that the Mohawk river was the northern boundary, and the west line running to the river came out at "Indian hill," which was described as the northwest corner of the patent. Evidence was given for the purpose of showing what and where

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this bill was. The testimony in the case was very voluminous, but this statement is sufficient for an understanding of the opinion of the court. The plaintiff claimed that the true location of the east line of Brodt and Livingston's patent would include the land described in his declaration, and the defendant contended that it was east of, and within the west line of, the Morris or Alexander patent, and was also included in the lands described in the declaration in the record of *Jackson v. Dunckle*.

The court charged the jury that the deeds from Freye to Medler, and from Medler to Dunckle, vested the title to lot No. 19 in Brodt and Livingston's patent in the elder Dunckle, the ancestor and deviser of the plaintiff; that the question for them to determine from the evidence was, which of the two lines was the true eastern boundary line of that lot, and this would depend upon the question whether the east or the west line which had been spoken of by the witnesses was the original line between the Morris patent and the Brodt and Livingston patent; that it was pretty evident from the descriptions that both were granted before any survey had been made. It also appeared that if the west division line should be adopted, one course in the Medler deed would be lost, and the lot, instead of containing 100 acres as stated in the deed, would only contain about 60 acres. That in their deliberations it would be important for them, if they could, to satisfy themselves where the two basswood trees stood, as they were referred to in the Brodt and Livingston patent as the point where the east boundary line of Brodt and Livingston's patent terminated and the southwest corner of the Morris patent. After further commenting upon and reviewing the evidence, the court left it to the jury to determine from all the evidence in the case which was the true boundary line between the patents, and instructed them that the plaintiff or defendant would be entitled to their verdict as they should determine that question. To this charge, and every part thereof, the counsel for the defendant excepted. The defendant's counsel requested the judge to charge the jury, that if they believed from the testimony the trespasses for which Jackson prosecuted Adam Dunckle were upon the seven acres in dispute in this suit, then that action

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was a bar to this action. This request the court refused, and the defendant by his counsel excepted. The defendant's counsel also requested the court to charge the jury, that neither the description given in Brodt and Livingston's patent, nor the deed from Henry Freye to Medler, nor the deed from Medler to Peter Dunckle, were evidence of the boundaries of Morris and Alexander and others' patent. The judge stated to the jury that nothing in these instruments would be conclusive upon the question as to the boundary of the Morris patent, but that the circumstances to which he had referred in his charge, in respect to these instruments, might properly be taken into consideration by them in their inquiries after the true boundary between the two patents, and he refused to charge otherwise in this respect. To which refusal and charge the counsel for the defendant excepted. The defendant's counsel requested the court to charge the jury that the Indian hill at the river was a monument mentioned in Morris' patent, and must control in adopting the courses given in the letters patent, and that the existence of old fences upon this line, for two miles, was strong and should be controlling evidence in favor of the west line. The judge refused to comply with this request, but stated to the jury that if they could satisfy themselves, from the evidence, as to the location of the Indian hill, it would be an important circumstance to assist them in finding the boundary line in question; that the existence of old fences along some portion of the westerly line was a circumstance in favor of adopting that as the true line. That they had a right to take this into consideration also, and to give it such weight as they should think it deserved, in determining the question submitted to them. To which refusal and charge of the court, and every part thereof, the counsel for the defendant excepted. The jury found a verdict for the plaintiff.

T. B. Mitchell & J. A. Spencer, for the defendant.

H. Adams, for the plaintiff.

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HAND, J. One question in this case is, whether the record of recovery in *Jackson v. Dunckle* is an estoppel, so as to bar the plaintiff of the right to set up title to the premises in question? The bill of exceptions upon which a new trial was granted in this cause upon that point, is not before us. The particular state of the cause, as it stood upon that hearing, can only be gathered from the opinion given upon granting a new trial. From that, I presume there was no such request to charge, as appears here. Jackson, the plaintiff in the former suit, is the grantor of the defendant's grantor. Consequently, if those deeds, in terms, cover the premises in question, or profess to convey all the rights of Jackson thereto, there is such privity of estate, that if Dunckle would be estopped were Jackson the plaintiff, he is so now.

On the last trial of this cause, the defendant requested the justice holding the circuit, to charge the jury, that if they believed, from the testimony in this cause, that the trespasses for which Jackson prosecuted Dunckle were upon the seven acres in dispute in this suit, then, that recovery was a bar to this action. This request was denied; and if the defendant's position was correct, a new trial must be granted.

Jackson sued Dunckle for trespass upon part of lots 4 and 5 of the 3d tier in the division of large lot No. 6 of Morris and others' patent, and his declaration particularly described the parcel by metes and bounds, and stated that it contained over 100 acres. The 2d count was for trespass, without particularly describing the lands; and the 3d for cutting and carrying away the trees, &c. on the land of the plaintiff. The defendant in that suit pleaded that the land mentioned in the three counts were one and the same close, and that the part of it upon which the supposed trespasses were committed, was the close, soil, and freehold of the defendant (Dunckle) in that suit. Issue was taken upon this plea, the replication denying that the close, or any part of it, belonged to Dunckle; and a verdict was rendered therein that the close in the said declaration mentioned was not, nor was any part thereof, the close, soil, or freehold of Dunckle, and the jury assessed the damages at six cents. On

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the trial of this cause, there was proof tending to show that the land for which this suit was brought was comprehended within the parcel described in the declaration in *Jackson v. Dunckle*. The verdict, it will be observed, stated that no part of the close described in that declaration was the close, soil and freehold of Dunckle; and if the seven acres now in controversy were included within the description in that declaration, of course it was covered by the verdict in that suit. On the other hand, as Dunckle pleaded that *that part* of the land upon which the *trespasses were committed* was his close, soil and freehold, and said nothing about the remainder, although the replication denied title to any part, the title to that part he had not trespassed upon was not strictly, or in terms, put in issue by the plea; and as that record does not state upon which part the trespass was committed, the verdict, it would seem, as to all not trespassed upon, is apparently, so far beyond the issue. The plea did not point out the particular portion trespassed upon, and deny trespassing upon the remainder; and in this respect, it seems, was quite unusual, and perhaps demurrable for uncertainty; as it would be difficult for the plaintiff to new assign so as to cover scattered parcels of the same close. But I think that point does not arise here. I understand the rule in relation to the plea of *liberum tenementum* to be, that it gives implied color to the plaintiff by admitting such possession in him as would suffice to maintain trespass against a wrongdoer, but to assert a freehold in the defendant, with a right to immediate possession. The plea is not supported by evidence of mere acts of ownership for less than 20 years, for by it the defendant admits that the plaintiff is in possession, and that the defendant is *prima facie* a wrongdoer; and he undertakes to show a title in himself that shall do away with the presumption arising from the plaintiff's possession, by showing title by deed in the usual way, or possession for 20 years. (*Rich v. Rich*, 16 *Wend.* 663. *Lempriere v. Humphrey*, 3 *Adol. & El.* 181. *Brest v. Lever*, 7 *M. & W.* 595. *Doe v. Wright*, 10 *Adol. & E.* 781.)

It was formerly supposed that if the plaintiff failed as to any part, the verdict must be for the defendant. (*Hanks v. Bacon*,

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2 Taunt. 159.) But now the contrary seems clearly settled; while on the other hand, the defendant will have a verdict if he proves title to the part trespassed upon; and is not bound in such cases to prove title to the whole close. (*Rich v. Rich*, 16 Wend. 663. *Tapley v. Wainwright*, 5 B. & Ad. 395. *Richards v. Peake*, 2 B. & C. 918. *Basset v. Mitchell*, 2 B. & Ad. 99. *Smith v. Royston*, 8 M. & W. 381.) In *Tapley v. Wainwright* it was held that the term "close" in the words of the issue, "the said close which," &c. was a divisible allegation. Ld. Denman, C. J. likened it to assumpsit for goods, with a plea of infancy, and replication that they were necessities; in which case the verdict would be for the amount shown to be necessities. In that case the verdict was allowed to be entered for the plaintiff for part, and for the defendant for the residue. And to the same point is *Richards v. Peake*, *supra*.

It is clear, then, that on the trial the plaintiff will recover if he show a trespass committed on any part of the close described in the declaration to which the defendant does not show title; and the defendant, although he has pleaded title to the whole, will succeed if he show title to that part upon which he has trespassed, notwithstanding he has no title to the remainder of the close. And if the plaintiff shows trespasses on different parts, and the defendant title to some of them, the defendant will have judgment as to those parts to which he has title, and the plaintiff as to the others. And with this agree the cases of *Rich v. Rich*, (16 Wend. 663,) and *King v. Dunn*, (21 Id. 253.) The plaintiff is not bound to show a trespass upon the whole premises, nor the defendant that he has title to the whole, in order to succeed; but each may succeed *pro tanto*, according to the proof. But there is another question: in case of a general verdict for either, what is the presumption? Judge Cowen said, in *Rich v. Rich*, that the plaintiff was entitled to nominal damages without proof. (16 Wend. 674.) This is upon the principle of implied admissions in a special plea, which confesses and avoids. We have seen that this plea admits possession in the plaintiff, which is *prima facie* evidence of title. Upon principle and analogy, then, it seems to me, that if but one close is

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set out and described, and judgment passes against the defendant upon the sole plea of *liberum tenementum*, the record is *prima facie* evidence of title in the plaintiff. That it may be fairly presumed, in that case, that there is unity of title to the whole close, and consequently, a presumption against the defendant having title to any part of it. And on the other hand, if a general verdict be in favor of the defendant, that the same presumption arises in his favor. In both cases, however, the presumption may be rebutted by showing what was actually in controversy on the trial upon this plea. And I understand the language used by Ld. Tenterden, C. J., and Littledale, J., in *Bassett v. Mitchell*, (*supra*), to refer to cases where each party had succeeded as to part. Such was that case; the defendant in his plea setting up a right to 6 acres and 2 roods, part of the close, but without specifying what part. And Littledale, J. adds: "The record would be evidence of a former decision as to part of the place in dispute; and it may be shown by proof which part that was. If this imposes any hardship on the plaintiff it may well be said on the other hand, that a defendant is subjected to hardship, because a plaintiff may recover by proving a trespass committed on any part of the close mentioned in the declaration; since *that declaration, unexplained by evidence, would be conclusive against the defendant afterwards, as to the whole close.*" If this be not so, no matter what unity of title and possession the plaintiff may have in an entire parcel; if the plaintiff take an inquest at the circuit, with nominal damages, or the defendant entered upon but one square rod of a lot of 100 acres, the record would be no evidence of his title in one case, and of only one rod (and that upon proof *aliunde*) in the other, against a defendant who had pleaded title in himself to the whole. If the defendant pleads title to a portion, specifying the quantity but not the location, and succeeds, then perhaps, under the decision in *Bassett v. Mitchell*, the *onus* of identifying the parcel in another suit, is upon the plaintiff. The language used by the judges there, may lead to that inference. Though that question did not arise, as the jury found for the defendant, in *Bassett v. Mitchell*, on the issue he had tendered,

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and the plaintiff was moving to set aside the verdict and enter a verdict for the plaintiff. All that was said on the question of estoppel was *obiter*. The only difficulty I have on this part of the case, is on account of the plea being, by its terms, a plea of title to only those parts trespassed upon; and may be said to leave any particular portion wholly in doubt, and afford no means of identifying the portions, the title to which was put in issue. But as the defendant failed altogether, thus distinguishing this case from *Bassett v. Mitchell*, under the special finding of the jury, that the defendant had title to no part of the close mentioned in the declaration, I think the presumption remains against him. It follows, that if the defendant in this cause proves that the conveyances from Jackson to Root and from Root to him, in terms, include the land described in the declaration in *Jackson v. Dunckle*, or that portion of it which must include the land now in question, if included at all; or purport to convey all the right which Jackson had at the time of commencing his suit, and that this land now in suit is a portion of that described in said declaration, *prima facie* the record is evidence that the title to this parcel was in controversy in that suit, and was found not to be in the plaintiff in this suit. And if it be proved that this parcel was the land, for trespass upon which that suit was brought and recovery had, then the record will be conclusive. This is the ground, substantially, upon which the defendant desired the case put. And this, I presume, clearly distinguishes this motion for a new trial from the former one.

But again; I am inclined to think that the learned justice who tried the cause, laid too much stress upon the descriptions in several instruments of conveyance through which the plaintiff deduced title, of the location of Brodt and Livingston's patent. Testimony in relation to the location of that patent was admissible, on the points of acquiescence and adverse possession. But as the Morris patent was first granted, the description of the land in a subsequent patent could be no evidence of the boundaries of the first; nor could the first patentees be affected thereby. And the same rule would apply to a practical loca-

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tion by the subsequent patentees. For the purpose of showing acquiescence or adverse possession, the evidence was admissible, but could not affect the claimants of the Morris patent in any other way. (*See the remarks of Chancellor Walworth in Adams v. Rockwell*, 16 Wend. 299; also *Van Wyck v. Wright*, 18 Id. 157.) The whole charge of the judge is not given; but I am inclined to the opinion that the qualifications to this part of the case, necessary to prevent a misunderstanding on the part of the jury, were not fully stated. The judge said the evidence would not be conclusive, but laid considerable stress upon the two basswood trees mentioned in Brodt and Livingston's patent, and refused to charge that the descriptions of the land found in the conveyance, proved on the part of the plaintiff, of that patent and of lands in that patent, were not evidence of the boundaries of the Morris patent. On a bill of exceptions, where it appears the charge or omission to charge may have misled the jury, it is error. As to the evidence of the true line it is conflicting, and does not so far preponderate as to require us to interfere upon that ground.

If the patent to Morris and others was granted before the actual location or survey of either of the patents to them, (which perhaps is not to be presumed, as a deficiency in the first, it would seem had been ascertained,) then there are but two natural and actual monuments mentioned in the grant of that one, the lines of which are in question, Indian hill, (now so called,) and the Mohawk River. The starting point had not been ascertained, and the lines are given by courses and distances until the hill is mentioned. This hill must be the north-west corner; and if it can be ascertained, will control at that point; and the course southerly from that, should have been run at the proper angles with the cardinal points as given in the grant, without reference to the magnetic pole or the declination of the needle. The judge was not sufficiently explicit on this point, in answer to the request made by the defendant's counsel. However, if there are lines purporting to be the boundary lines between the two patents which are more than a century old, as contended in this case, they bear great intrinsic evidence from their anti-

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quity alone, although their origin and history are now unknown. If there be in truth two, and both very ancient, they in some measure neutralize each other; and if long disputed, are entitled to less consideration. Considering the length of the lines and the uncertainty in the use of the compass, and particularly if they were run by different surveyors under different employers, the discrepancy is not so surprising. But if the question of actual location shall again arise in the cause, these are matters for the consideration of the jury.

WILLARD, J. This was an action of ejectment, brought to recover about seven acres of land, which the plaintiff claims as a part of lot No. 10 in the Livingston patent, in the town of Canajoharie and county of Montgomery. The plaintiff deduced a regular paper title to the premises, traced back to the original patent granted in 1738. The defendant, as one ground of defense, gave in evidence an exemplified copy of a record of judgment of this court in an action of trespass *quare clausum fregit* brought by Samuel Jackson against Adam Dunckle, the now plaintiff, for breaking and entering the close of the plaintiff and cutting timber therein, &c. &c. on the 1st of January, in the year 1827, and on divers other days and times between that day and the commencement of this suit, describing the premises as part of lots No. 4 and 5 in the third mile or tier of lots in a division of large lot No. 6, in a patent granted to Van Horne, Morris and others, and therein describing the premises by metes and bounds, and stating them to be one hundred and five acres. The declaration was in the usual form of a declaration in trespass *quare clausum fregit* for breaking and entering and cutting down and carrying away timber. To this declaration the defendant, Dunckle, pleaded *liberum tenementum*, viz. that at the time when, &c. the said described premises were and still are the soil and freehold of him, the said Adam Dunckle. The plaintiff took issue upon that plea. The issue so joined was tried in Montgomery county, in November, 1833, before Judge Cowen, then circuit judge, when the plaintiff obtained a verdict for six cents damages and the costs, and judgment was per-

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fectd on the said verdict at the January term, 1834. The defendant deduced a regular paper title to the premises described in the declaration in the said action of trespass, from Samuel Jackson, the plaintiff therein, and proved by a surveyor that the seven acres sought to be recovered in this suit, are embraced within the description of the premises set forth by metes and bounds in the declaration in the aforesaid trespass suit. It was shown that on the trial of the trespass suit before Judge Cowen, in 1833, no witnesses were sworn, but that the defendant permitted the plaintiff to take a verdict for the nominal sum of six cents.

In reference to this branch of the case the counsel for the defendant requested the judge to charge the jury, that if they believed, from the testimony in this cause, that the trespasses for which Jackson prosecuted Adam Dunckle were upon the seven acres in dispute in this suit, then that action was a bar to this action. The court refused so to charge, and the defendant's counsel excepted.

It was proved on this trial, by Matchin, the surveyor, that he surveyed the premises in question, for Jackson, preparatory to the trial of the trespass cause in November, 1833. That it was charged by Jackson at that time, that the suit was brought by him for trespass by Dunckle on the seven acres now in controversy. That Dunckle came out to the premises, while the witness was surveying, and said he had cut timber between the two lines, and that Jackson had sued him for it. The seven acres in question lie between two lines, one of which was claimed by the one party and the other by the other, as the true line. There was, therefore, evidence from which the jury might well have found that the trespasses for which Jackson sued Dunckle in 1833, were committed on the premises now in dispute. The learned judge therefore did not refuse the prayer of the defendant's counsel, upon the ground that there was no testimony authorizing the jury to find that the trespasses for which Dunckle was prosecuted by Jackson, were committed upon the same seven acres, now in dispute; but upon the ground, that assuming the fact to be so, it formed no bar to the action. If the

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judge was wrong in thus refusing to charge, there should be a new trial.

The general rule laid down in Chief Justice Eyre's judgment in the Duchess of Kingston's case is, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea in bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court. (1 *Phil. Ev.* 333.) And it is evidence for or against privies in blood, privies in estate, and privies in law, as well as for or against the parties to the suit. (*Id.* 324, 325.) A judgment is final for its own proper purpose and object, and no further. A recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject matter. Thus a finding upon title, in trespass, not only operates as a bar to the future recovery of damages for a trespass founded upon the same injury, but operates also as an estoppel to any action for an injury to the same supposed right of possession. (*Id.* 335.) This is expressly shown in the elaborate opinion of Lord Ellenborough in *Outram v. Morewood*, (3 *East*, 346,) where the whole doctrine is fully discussed. As the former judgment can not be pleaded by way of estoppel, in an ejectment suit, the defendant is entitled to the same advantage of it as evidence under the general issue. (*Dame v. Wingate*, 12 *N. Hamp. Rep.* 291.) When the evidence of a former recovery is properly received under the general issue, it is just as conclusive as though the matter had been specially pleaded by way of estoppel. (*Per Bronson, J. in Young v. Rummell*, 2 *Hill*, 480, 481.)

"For example," says Bronson, J. in the same case, "the defendant may give the judgment in evidence under not guilty, in ejectment." "The judgment is only evidence by way of bar when the same matter was directly in question in the former suit. The record must show that the same matter might have been in question on the former trial, and then the fact that it did come in question, may be shown by proof *aliunde*." (*Id.* 481.) The record in the suit between Jackson and Dunckle put in issue the title only. It admitted the possession of Jackson, and the trespass by the defendant. The verdict of the

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jury found this title in Jackson. Whether this was founded upon the testimony of witnesses, or the concession of the counsel on the trial, is immaterial. It was proved expressly that the suit was brought for trespasses on the land in question. Hence, there are the requisite averments in the record, and proof *aliunde* in this case to make it conclusive.

There is a difference, it has been said, between *real* actions and *personal* actions, as to the conclusiveness of a judgment. In a personal action, as debt, account, &c. the bar is perpetual; for the plaintiff can not have an action of a higher nature, but has no remedy except by error. But if a plaintiff be barred in a real action by judgment on a verdict, demurrer, confession, &c. yet he may have an action of a higher nature, and try the same right again; because it concerns the freehold and inheritance." (*Outram v. Morewood*, 3 East, 359.) The case of *Wade v. Lindsey*, (6 Metc. 407,) was decided upon this distinction. It was a writ of entry, averring that the demandant was seised within thirty years, and had been disseised by the tenant. At the trial the demandant gave in evidence a judgment recovered by him in May term, 1839, against the tenant in trespass for breaking and entering the demandant's premises and pulling down a building thereon, and converting the materials to his own use. In that action the defendant, (tenant in this,) pleaded the general issue, and filed a notice that he also claimed title to the premises described in the plaintiff's declaration. The jury found the defendant guilty, and assessed the damages at sixteen dollars and fifty cents, and they also found that the defendant had no title to the land, and that the soil and freehold were in the plaintiff. The demandant relied upon this judgment, among other things, to establish his title, in this writ of entry. On this branch of the case, Wilde, J. in delivering the judgment of the court, says, "This undoubtedly is good evidence of the demandant's right of possession; but it is no *conclusive* proof of his right of property, or of his title to maintain a writ of entry." Had this action been ejectment to establish a possessory right, instead of a writ of entry brought for the mere right of property, it would follow, from the reason-

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ing of the learned judge, that the former recovery in the suit in trespass, where the title was put in issue and found for the plaintiff, would have been conclusive.

It remains to consider the effect of the revised statutes upon the rights of these parties. By those statutes writs of right were abolished, and the action of ejectment retained, and allowed to be brought in the same cases in which a writ of right might then (1830) be brought by law to recover lands, tenements or hereditaments; (2 R. S. 303;) and by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser. As the plaintiff derived his title through the will of his ancestor, bearing date 7th January, 1838, he could not have maintained a writ of right, as the law stood prior to the revised statutes. He must have counted on the seisin of his testator, in order to overreach the recovery of Jackson in the trespass suit. This he could not do by law. (*See Williams v. Woodard*, 7 Wend. 250.) The present action, therefore, stands on the footing of an ordinary ejectment, and is controlled by the 3d section of the act. (2 R. S. 303.) By that section it is enacted that no person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial. The recovery by Jackson in the trespass suit in 1833, shows that the plaintiff has no subsisting title to the possession of the premises.

I am not aware that any thing has been said hitherto which is in conflict with the decision of the supreme court when they sent this cause down to a new trial.(a) It probably did not appear, in the former case, that the suit was for trespasses on the seven acres in question. Beardsley, J. says, in order to make the record an estoppel on the question of title to the seven acres, it must be shown by extrinsic evidence that the title to said seven acres was directly in controversy on the trial of the action of trespass, and that the jury passed upon that question. The record, as has been already said, shows that title was the only

(a) See 5 Denio, 296.

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question in issue; and the proof was ample for the jury to find that the trespass for which the suit was brought was committed on the seven acres. The jury must, therefore, necessarily have passed upon the question of title; and whether the right of recovery, on that trial, was proved by witnesses, or conceded by the counsel, is unimportant.

I think, therefore, the learned judge erred in not charging as requested. And for this error there should be a new trial, with costs to abide the event.

PAIGE, J. concurred.

New trial granted.

SAME TERM. *Before the same Justices.*

CRIPPEN vs. THOMPSON and BISHOP.

Upon a mere indemnity to save another harmless from a bond executed by him, the party indemnified, in order to recover, must show damage, and that involuntarily sustained.

The damage must have been suffered or paid by compulsion—by some proceedings *in invitum* against the party indemnified.

DEMURRER to declaration. The action was debt on a bond for \$3000, given to the plaintiff by Thompson as principal and Bishop as his surety, dated on the 18th of June, 1844, with a condition, to be void if Thompson should, among other things, "save harmless the said" obligee "from a bond executed by him to Nathan R. Crippen deceased, dated on or about the 3d day of March, 1840, the said Crippen giving the said Thompson notice of any proceedings at law or otherwise thereon." The declaration then stated that a bond was given to N. R. Crippen sen. by the plaintiff, in 1840, by which, among other things, he agreed to pay all N. Crippen's debts then due and owing by him,

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and averred that Thompson agreed to save the plaintiff harmless thereon, and from all debts by said N. R. Crippen sen. due and owing at the time of executing the bond. That Thompson did not save the plaintiff harmless from said bond, nor from said debts, but on the contrary he was called on to pay a debt of N. R. Crippen, sen. due to J. Dayton, which was one he had agreed to pay by the condition of his bond to N. R. Crippen deceased. That after giving said bond to N. R. Crippen, sen. and before the defendants gave this bond, he had agreed with Dayton to pay to him the debt due to him from N. R. Crippen, sen. when he should be thereafter requested. That in July term, 1845, the plaintiff was sued by Dayton for said debt, and judgment was rendered against him and docketed Dec. 17, 1845, for \$128,10, which was paid by the plaintiff on the 19th of January, 1846. That on the 1st day of July, 1845, and also before and after that day, the defendant Thompson had due notice of the said debt, demand or account of Dayton against N. R. Crippen, and the defendants had notice of the suit brought by Dayton, and were requested to save the plaintiff harmless from the bond and from the payment of the debt. Breach, that Thompson did not pay the debt due to Dayton from N. R. Crippen, sen. nor pay the plaintiff the judgment recovered by Dayton, and did not save him harmless, &c. The defendants craved oyer of the bond, which was given, and then demurred specially; and joinder.

I. W. Thompson, in person.

C. L. Allen, for the plaintiff

By the Court, HAND, J. There is nothing in the condition of the bond, in terms, binding the defendant Thompson to save the plaintiff harmless from the debt of Nathan R. Crippen, deceased. The condition is to save harmless the plaintiff from a bond, he had, in 1840, given to N. R. Crippen, sen.; the plaintiff giving notice to the defendant Thompson of any proceedings at law or otherwise thereon. The covenant is that Thompson

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should save harmless the plaintiff from the bond he had given. That bond was to pay the debts of Crippen, sen., and the Dayton claim was one. Where the contract is one merely of indemnity, and not to pay, or against liability, actual damage must be shown. (*Gilbert v. Wiman*, 1 Comst. 550. *Churchill v. Hunt*, 3 Denio, 321. *Post v. Jackson*, 17 John. 239. *Aberdeen v. Blackmar*, 6 Hill, 324. *Lee v. Clark*, 1 Id. 56. *Thomas v. Allen*, Id. 145. *Halsey v. Reed*, 9 Paige, 451. *Colbrige v. Heywood*, 9 A. & E. 633. *Reynolds v. Doyle*, 1 M. & Gr. 755.) If *Rockefeller v. Donnelly*, (8 Cowen, 623,) can be sustained, it must be upon the peculiar language used, and the object of the bond required by the statute in such cases. Assistant Vice Chancellor Sandford said, in *Rawson v. Copland*, that "the distinction is, between an undertaking to do an act in discharge of the plaintiff, as to pay his debt, and one to acquit and discharge him of all damages by reason of his debt or obligation." (2 Sandf. Ch. Rep. 254.) Here the agreement was to save the plaintiff harmless from an obligation he had given his father to pay his debts. In *Thomas v. Allen*, (*supra*,) the agreement was to pay the plaintiff \$800 by satisfying a certain bond and mortgage A. had given to B., and to save the plaintiff harmless therefrom; with an allegation that the bond and mortgage had become due and the defendant had not paid it. That was an express agreement to pay. *Churchill v. Hunt* was decided upon the same grounds. It is true that the judge who delivered the opinion in the last case seemed to think damage must be shown in case of indemnity against liability. If so, one step more towards confining the recovery to actual compensation has been taken.

The question in this case, as we shall see, is whether the plaintiff can pay the debt of his father, voluntarily and without notice to the defendant Thompson, and then recover upon this bond, against him and his surety? Buller, J. in *Duffield v. Scott*, (3 T. R. 374,) said, "I believe there are cases which say that to entitle a person to recover on a bond of indemnity, he must show he was compelled by law to pay the debt." But he adds, "the purpose of giving notice, is not in order to give a

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ground of action ; but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuses to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." Grose, J. "agreed in this latter reason ; and said he recollected many similar cases in which no notice was alledged, that the action was commenced." Here it is said that notice is not required as a ground of action, but it was thought that at least the commencement of a suit was necessary. I suppose, however, only in cases of mere contracts of indemnity. In *Webb v. Pond and Lansing*, (19 Wend. 423,) the bond given by the defendants to the plaintiff, (Lansing being a surety,) recited that the plaintiff had conveyed to Pond a house on which was a mortgage given by the plaintiff to A., of which P. agreed to assume the payment and save the plaintiff harmless from his liability thereon, and on the bond given therewith, and the defendants covenanted to indemnify and save harmless the plaintiff from his liability on said bond and mortgage. Breach, that P. did not, and would not, provide means for a payment that had become due, and that the defendants did not indemnify and save him harmless from his liability on the bond and mortgage, but that he was called upon and *forced* and *obliged* to and did pay, &c. The defendants demurred, assigning for cause that it was not alledged that the plaintiff was "legally compelled to pay." But the court said it was not simply a bond to indemnify and save harmless against the bond, but to indemnify and save harmless from his liability on the bond, and that being liable he was forced and obliged to pay. This was but an application of the principle found in *Rockfeller v. Donnelly*, and *Chace v. Hinman*, (8 Wend. 452,) that an action on a covenant to save one from liability might be sustained without showing the plaintiff had been damnified ; though in *Webb v. Pond* payment was also alledged. And see the opinion of Gardiner, J. in *Gilbert v. Wiman*. In the case before us the covenant is to save harmless from the bond, and not from any liability on the bond ; and

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therefore damage must be shown. And I believe in all the cases of this kind, where the plaintiff has succeeded, the damage has been suffered or paid by compulsion, by some proceedings *in invitum* against the party indemnified. Here is no absolute agreement to pay, and no agreement to keep the party clear from liability, but merely to indemnify; and in such cases it is not certain, until it is ascertained by legal proceedings, that the covenantee will ever be damnified, or how much; and it is not competent for him to take the matter into his own hands in the first instance. Perhaps after a suit commenced, and notice given to the obligor, and neglect by him to defend, the obligee would be warranted in putting a stop to the costs. But I think an opportunity must, in case of a mere obligation to indemnify, be afforded the obligor to test the legality of the claim. Such is the whole scope of the case of *Webb v. Pond*; and the principle is a sound one. In this case the declaration avers that the plaintiff, after giving the bond to pay his father's debts, and before the defendant gave this bond, became directly liable to pay the debt to Dayton when he should be requested, by an agreement made by him with Dayton. That after this bond was given he was sued on that liability by Dayton, who obtained judgment which the plaintiff had to pay, of all of which Thompson had notice. But this was not a suit on the bond given to Crippen, sen. nor has the plaintiff paid any thing on that bond. He must be damnified by that bond. Besides; it seems he had assumed this debt before the bond was given to him by the defendants, and it is very probable he was not liable to his father *on his bond* for the payment thereof; and in that case the defendant could in no event be liable.

But again; if he assumed the debt after receiving the bond from the defendants, he thereby precluded all examination and defence as to that debt, made himself directly liable for it, and probably discharged all liability in relation to it upon the bond he gave his father; and he prevented the defendants from standing between him and all harm, on the bond. I may add, that the condition of this bond is that the defendant shall have an opportunity to defend; as the obligee is to give him notice

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of any proceedings thereon. But had that clause been omitted, as I have before stated, I think the case may stand on the broad principle, that on a mere indemnity to save another harmless from a bond, the party indemnified, to recover, must show damage, and that involuntarily sustained.

There must be judgment for the defendants, with leave to the plaintiff to amend on payment of the costs of the demurrer.

Judgment for the defendants.

SAME TERM. *Before the same Justices.*

PATTISON and others, survivors, &c. *vs.* BLANCHARD.

The plaintiffs made an agreement with the defendant, whereby, in consideration that they, among other things, agreed to relinquish and surrender to the defendant that part of the mail route No. 933, between Saratoga Springs and Griswold's, and to run to and from and in connection with the defendant, their stages on said route; to deliver to the defendant's teams at G.'s all passengers transported by the plaintiffs, and to receive at G.'s all passengers brought there by the defendant's teams, and that the defendant might receipt, at Saratoga Springs, all the fare received from passengers; that the plaintiffs would keep a sufficient number of teams at G.'s to transport all passengers delivered there by the defendant, and that they would not interfere with travel on the defendant's road, &c. the defendant agreed to run that part of the road from Saratoga Springs to G.'s, in a good and sufficient manner to carry all the passengers, &c. and to deliver them to the teams of the plaintiffs at G.'s; that he would at all times have a sufficient number of teams and coaches at G.'s to receive all the passengers delivered there by the plaintiffs; *that he would receive, for his portion of the fare received from the passengers in proportion to the distance said passengers should be conveyed by each party*; that he would regularly settle up all accounts correctly between the parties monthly, and if any balance should remain in his hands, due to the plaintiffs, that he would pay the same to them forthwith. In an action of *assumpsit*, by the plaintiffs, against the defendant, to recover the amount belonging to the plaintiffs, for the fares received by him from passengers, under this agreement, and which he had neglected and refused to pay over to them, the declaration not alledging that any balance was ever struck, between the parties, or that the defendant, since the making of the agreement, had promised to pay any balance;

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Held, on demurrer, that with respect to the division of the passage money, the parties were *partners*, as among themselves; and that the action would not lie. One partner can not maintain *assumpsit* against his copartner, except upon a balance struck between them, and a promise to pay it.

THIS was a demurrer to the first count of the plaintiffs' declaration. The count stated, in substance, that on the 25th of April, 1844, the plaintiffs doing business by the style of the northern transportation company, at Troy, made an agreement with the defendant, whereby, in consideration that the plaintiffs, among other things, agreed to relinquish and surrender unto the defendant that part of the mail route number 933, between Saratoga Springs and Griswold's, a public house on said route, about five miles from Sandy Hill, and to run to and from and in connection with the said defendant, their stages on said route, to deliver to the said defendant's teams, at Griswold's aforesaid, all passengers passing on said road, transported by the said plaintiffs, and to receive at the same place, (to wit, at Griswold's,) all passengers brought there by the teams of the said defendant, and that the said defendant might receipt at Saratoga all the fare received from passengers wishing to pass over said road, and that the plaintiffs would keep a sufficient number of teams, at Griswold's, to transport all passengers delivered there by the defendant, and that they would not interfere with travel on said defendant's road, and would keep a sufficient number of teams and coaches to transport all passengers from Whitehall wishing to go by Saratoga, he, the defendant, agreed to and with the said plaintiffs, to run that part of the said road above mentioned, to wit, from Saratoga Springs to Griswold's, aforesaid, in a good and sufficient manner to carry all the travel that might wish to pass on said road; that he would at all times have a sufficient number of teams and coaches at Saratoga, to carry all passengers that might wish to go to Glen's Falls, Sandy Hill, or Whitehall, or to any intermediate place, and deliver such passengers to the teams of the said plaintiffs at Griswold's aforesaid, within a suitable and reasonable time from the departure of the same from Saratoga, and that he would at all times have a sufficient number of teams and

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coaches at Griswold's to receive all the passengers and baggage that might be delivered there by the said plaintiffs, or their teams, *that he would receive for his portion of the fare received for said passengers and their baggage, in proportion to the distance said passengers should be conveyed by each party, to wit, by the said plaintiffs, and the said defendant.* That he, the said defendant, would regularly settle up all accounts correctly from the running of said roads, between the parties monthly, and if any balance should remain in his, the said defendant's, hands, due to the said plaintiffs, that he the said defendant would forthwith pay the same over in cash, and although afterwards, to wit, on the 25th day of October, one thousand eight hundred and forty-four, at the place aforesaid, the defendant had before that time received fare from passengers, before that time, passing on the said road, to wit, from Saratoga Springs to Glen's Falls, Sandy Hill, Whitehall, and to the intermediate places, to a large amount, to wit. to the amount of \$1000, and although the plaintiffs had in all things performed, fulfilled and kept the agreement with said defendant, on their part to be performed, fulfilled and kept, yet the said defendant, not regarding his said promise, &c. but contriving, &c. hath not, although he was afterwards, to wit, at Troy, &c. requested by the said plaintiffs so to do, as yet paid over the balance or sum of money remaining in his hands, belonging to the said plaintiffs, for the fares so received by him, but hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiffs of one thousand dollars.

The defendant demurred to the above count, and assigned for cause, *first*, that the contract set forth in the count was a contract for a partnership between the defendant and the plaintiffs. Second. That the damage claimed by the said plaintiffs in said first count appeared to have arisen out of a partnership between the parties, of which this court can not take cognizance in this form of action. Third. That the matters set forth in said count related to copartnership concerns, &c. The plaintiffs joined in demurrer.

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W. A. Beach, for the defendant.

H. P. Hunt, for the plaintiffs.

By the Court, WILLARD, J. The contract set forth in the first count of the declaration, creates a partnership between the respective parties, with respect to the fare received by either of them for passengers and their baggage, on the route from Saratoga Springs, by the way of Griswold's, to Glen's Falls, Sandy Hill, Whitehall, and the intermediate places. The rule of apportionment agreed upon by the parties, was according to the distance which the several passengers should be carried by the respective parties. This mode of dividing the profits constitutes that community of interest, which characterizes a partnership between individuals, and entitles either of them to an account. This case is in principle exactly like *Fromont v. Coupland*, (2 Bing. 170.) There, the plaintiff and defendant had been engaged in running a coach from Bath to London. The plaintiff found the horses for one part of the road, and the defendant for another; and the profits of each party were calculated according to the number of miles covered by his own horses: *the plaintiff received the fares and rendered an account thereof to the defendant every week.* It was held that the plaintiff and defendant were partners in the concern, and that in an action by the plaintiff against the defendant upon a separate transaction, the defendant could not set off a balance which had been declared in his favor upon these weekly accounts. It did not appear that any final account had been stated, or that the plaintiff had made any promise to pay the balance in question. The case of *Fromont v. Coupland* is in some respects different from this. The question in that case arose upon the trial, and upon a set-off, and this upon a demurrer. But the defendant would have been entitled to set off the balance, if he could have maintained an action at law for it. In that case too, the weekly balances had been rendered by the plaintiff to the defendant. In this case no balances were ever struck, either of the monthly accounts which were to be rendered, or of the final account. In

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that case, although the account had been rendered from week to week, yet as no final balance was struck, it was observed by Park, J. that "it is a final balance alone that can be allowed as a set-off, and that only when there has been a promise to pay it." The case of *Foster v. Allanson*, (2 D. & E. 479,) and *Moravia v. Levy*, (*Id.* 283, n.) are in point to show that one partner can not maintain assumpsit against his copartner, unless upon a balance struck and a promise to pay; both of which cases are recognized as sound law in *Fromont v. Coupland*, (*supra*;) *Casey v. Brush*, (2 N. Y. Term Rep. 293;) and *Nivern v. Spickerman*, (12 John. 401, 402, n.) And the doctrine itself is repeated in *Halsted v. Schmelzel*, (17 John. 80,) and *Murray v. Bogert*, 14 *Id.* 318.)

To what extent the parties were partners, as to the public, the present action does not lead us to inquire. Those who wish to see how far this contract rendered the parties jointly liable to third persons for injuries done by their servants or by either of the partners, will find the subject fully discussed and correctly adjudged in the well considered case of *Champion v. Bostwick*, (11 Wend. 571;) and *S. C. in error*, (18 *Id.* 175.) It is not pretended that the partnership between the parties was general. Indeed, with respect to most of their transactions, such as purchasing horses, carriages, employing drivers, and defraying the expenses of their respective teams, and the like, they incur no joint liability, and each is answerable only for his own acts. But as regards the public, for an injury occasioned by the acts or omissions of either of the parties, or their servants, it is well settled that they are partners. And with respect to the division of the passage money, they are clearly partners as among themselves.

There is no averment that any balance was ever struck between the parties, or that the defendant, since the partnership, promised to pay any balance. Even in *Wetmore v. Baker*, (9 John. 307,) there was a balance struck by the mutual agreement of the parties. And in that case the court held that the law implied a promise to pay, and allowed the plaintiff to recover in an action of assumpsit. The language of the court in

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this case is not warranted either by prior or subsequent adjudications. (*See* 2 N. Y. T. R. 293; 12 *John*. 401, 2; 14 *Id*. 318; 17 *Id*. 80.) The case itself, however, seems to have been correctly decided, because it in truth appears that one of each of the partners forming the stage copartnership was present at the time the balance was struck, and one of the defendants remarked that "he expected to have to pay it." Here was abundant evidence for the jury to find an express promise to pay, and therefore the court need not have rested it upon the ground on which it seems to have been placed. Chancellor Walworth, in adverting to it, in *Champion v. Bostwick*, (18 *Wend*. 182, 183,) while he approves of the decision, places the liability of the defendants upon the ground that one of the partners in each of the firms forming the stage copartnership was present when the account was stated, and agreed to it.

We think the defendant is entitled to judgment on the demurrer, with leave for the plaintiffs to amend on payment of costs.

Judgment for the defendant.

SAME TERM. *Before the same Justices.*

WILSON, receiver, &c. vs. ALLEN and others.

The object of a case, under the code of procedure, of 1848, made by a party desiring a review upon the evidence appearing on the trial before the referee, is to enable the appellant to call in question the facts stated by the referee in his report.

It is analogous to the old practice of moving to set aside a report as being against the weight of evidence. If the admissions in the pleadings, and the other evidence in the cause, warrant the finding of the facts as stated by the referee, in his report, it can not be set aside as being against evidence.

A receiver, duly appointed in a creditor's suit, can maintain an action of trover for the property belonging to the defendants therein, without showing an assignment executed by all of such defendants.

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The order for the appointment of a receiver, in a creditor's suit, followed up by a consummation of the appointment by the giving of bail, vests the personal estate and equitable interests of the judgment debtors in such receiver, as of the date of the order, without the execution of any transfer or assignment.

THIS was a civil action, commenced and carried to judgment under the code of 1848. It was tried before a sole referee, in pursuance of title 8, chapter 5, of the code, and a report was made in favor of the plaintiff for \$150. According to the former division of actions, it was trover for three sets of stove patterns. The defendant excepted to the decision of the referee in reporting for the plaintiff, and he also desired a review upon the evidence appearing on the trial, according to section 223 of the code of procedure. He appealed from the judgment rendered on the report, by a notice dated 12th of December, 1848, according to section 275. A copy of the appeal, and of the judgment roll, embracing all the papers mentioned in section 236, were furnished to the court by the appellant.

E. F. Bullard, for the appellant.

F. S. Edwards & G. L. Wilson, for the respondent.

By the Court, WILLARD, J. The object of a case made by a party desiring a review upon the evidence appearing on the trial before the referee, is to enable the appellant to call in question the facts stated by the referee in his report. (*Compare §§ 222 and 223.*) It is analogous to the old practice of moving to set aside a report as being against the weight of evidence. If the admissions in the pleadings, and the other evidence in the cause, warrant the finding of the facts as stated by the referee in his report, it can not be set aside as against evidence. Having carefully read the pleadings and testimony, it appears to me that the referee has correctly stated the result, in his report. This brings us to the questions arising out of the defendant's exceptions to the report; and it involves the inquiry, whether the referee drew the correct conclusions of law from those facts. From the report of the referee it appears that on

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the 14th of September, 1847, one Philip Faust filed a creditor's bill in this court against Eli C. Robinson, Charles W. Corning, and Elijah N. Aikin, which was taken as confessed by all the defendants on the 13th of November, 1847. That on the 11th of October, 1847, an order of reference was made in said cause to appoint a receiver, and on the 15th of November, 1847, the plaintiff was duly appointed receiver of all the property and effects of the defendants in that suit. On the same day Robinson and Corning, two of the defendants, executed the usual assignment to the receiver; Aikin, the other defendant, being out of the state.

At the time of filing the bill, and of the assignment, the defendants in the creditor's suit were the owners of three several sets of iron patterns of a stove called Robinson's patent air tight cooking stove, which patterns were then in possession of the defendants in this action, who are copartners, and who had a lien upon them for repairs made to them to the amount of \$32,50. On the 20th of January, 1848, the defendants in this action recovered a judgment in this court against the defendants in the creditor's suit (Robinson, Corning & Aikin) for damages sustained on a contract for the manufacture of the said stoves, in which judgment was included the said claim of \$32,20 for repairs made upon the said patterns, and on the 22d of Feb. 1848, sold the said patterns under an execution upon said judgment, the same being still in their possession. Upon the sale the same were bid off by the defendant Allen alone, but the defendants still hold possession of the said patterns since the said sale. On the 19th of May, 1848, and before the commencement of this action, the plaintiff demanded the patterns both of Allen and the defendants, and they refused to deliver them up. The value of the patterns is \$150. The referee therefore found, as a conclusion of law, that there was due from the defendants to the plaintiff \$150, besides costs.

The important point in the case is, whether the plaintiff can maintain an action for the property, without showing an assignment executed by all the defendants in the creditor's suit. The defendant's counsel insists that as the assignment was exe-

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cuted by only two of the defendants, in their individual character merely, it does not convey the joint interest of the whole three defendants. On the part of the plaintiff it is urged that the order for the appointment of the receiver in a judgment creditor's suit, followed up by a consummation of the appointment by the giving of bail, vests the personal estate and equitable interests of the judgment debtors in such receiver, as of the date of the order, without the execution of any transfer or assignment. If this be so, the title of the plaintiff to maintain the action is complete, without reference to the assignment.

In equity, an order for a receiver, when his appointment is completed, vests in him all the property and effects, subject to the order, without an assignment. (*Mann v. Pentz*, 2 Sand. Ch. Rep. 257.) At law, an ordinary receiver was not considered as having the legal title, so as to authorize him to institute a suit in his own name for any debt or demand transferred to him, or to the possession or control of which he was entitled under an order of this court, until the act of April, 1845, in relation to the power of receivers and of committees of lunatics and habitual drunkards. (*Laws of 1845*, p. 90, § 2, per *Walworth*, Ch.; *Wilson v. Wilson*, 1 Barb. Ch. Rep. 594; and see *Storm v. Waddell*, 2 Sand. Ch. Rep. 594.) By the statute referred to, "receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the court of chancery, may sue in their own names, for any debt, claim or demand transferred to them, or to the possession or control of which they are entitled as such receiver or committee." It matters not whether this transfer be by an assignment of the party, under seal, or by force of the order appointing the receiver. In either case the title is complete, and the statute vests the right of action in the party who is clothed with the interest. The principle of the act of 1845 is carried out, in this respect, by § 91 of the code of procedure requiring every action to be prosecuted in the name of the real party in interest. (§ 93.)

The property in question in this case was movable chattels, and it thus became vested in the plaintiff on the 15th of November, 1847, before the defendants recovered judgment against

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the defendants in the creditor's suits. The title of the plaintiff is as perfect as if he had levied on the property under an older execution. (*Storm v. Waddell*. 2 Sand. Ch. Rep. 594.) He has a clear priority over the defendants, who purchased under a later execution and are chargeable with notice of the pendency of the creditor's suit. (*Murray v. Ballou*, 1 John. Ch. Rep. 566. *Heatty v. Finley*, 2 Id. 158.)

There is nothing in the delay of the plaintiff to take possession of the property, calculated to impair his right. The defendants are not shown to have been prejudiced by the delay. Even an execution does not become dormant by lapse of time, unless the delay is by order of the judgment creditor. *Non constat* that the plaintiff knew of this property till the defendants sold it under their execution. The defendants, in whose hands the property was left, can not with much grace put forth the objection that their possession was a fraud upon themselves. It is doubtful whether the defendants ever had any lien upon the patterns for the \$32,50. But the fact is conceded by the plaintiff, in the complaint, but avoided, first, by alledging a tender before suit brought, and secondly, by averring that the same amount was included in the defendant's judgment against the defendants in the creditor's suits. The tender is admitted by the defendants in their answer, and the fact that that sum is embraced in their judgment, is also conceded. Either fact puts an end to the defense arising from the law of lien.

I see no reason to disturb the report of the referee, and his decision must be affirmed.

Judgment of referee confirmed.

SAME TERM. *Before the same Justices.*

VAN DERVEER *vs.* WRIGHT.

The act of May 2d, 1835, authorizing an assignee for a valuable consideration, of a note, &c. to sue thereon in his own name when the assignor is dead, if there be no personal representatives of the assignor, or they refuse to sue, does not cover cases of mere gifts, or assignments founded upon natural love and affection, between near relatives by blood.

A promissory note payable to A. or order can not be assigned by parol; and if not endorsed by A., nor transferred, except by a guaranty indorsed thereon by him, a subsequent holder must bring himself within the statute, before he can sue the guarantor in his own name; particularly upon a conditional guaranty, which is properly a contract between the immediate parties thereto.

A guaranty that a demand is collectable is a conditional promise, binding upon the guarantor only in case of diligence.

After the guarantor of a note has been discharged, by the laches of the holder, there is no moral obligation to pay it, and he can not be again made liable, even upon an express promise.

MOTION to set aside the report of a referee. On the 2d of August, 1836, one James B. Reid made his promissory note as follows: "Nine months after date, I promise to pay D. Wright or order, at the Montgomery County Bank, two hundred and fifty dollars value received, with interest.

August 2, 1836.,

JAMES B. REID."

On the 28th September following. Wright, the payee, for a valuable consideration, transferred the note to John Van Derveer, senior, father of the plaintiff, and executed a guaranty in writing indorsed on the note, in these words: "I guaranty the collectability of the within note to John Van Derveer, for a valuable consideration. September 28, 1836. D. WRIGHT."

John Van Derveer, senior, died in 1839, but before his death he divided his property among his children, and this note fell to the plaintiff. Each of Van Derveer's children, the plaintiff among the rest, executed to their father a bond, on receiving his property, conditioned to pay him an annuity of five hundred dollars during his life. This, in addition to love and affection,

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was the consideration for the assignment to the plaintiff of the note in question. John Van Derveer, senior, died as before stated, in 1839, intestate, and no administrators were ever appointed on his estate.

The plaintiff in this cause, in May term, 1840, recovered a judgment in the supreme court, on this note, against the maker, for \$169,96 damages, besides costs, and an execution was duly issued and returned *nulla bona*, &c. It was also admitted that the maker was discharged under the bankrupt act, in 1842. It was proved that after the note became the property of the plaintiff, the defendant requested the witness to tell the plaintiff not to prosecute the note, for he had made arrangements with Reid to pay it. This testimony was objected to, but admitted by the referee. It was also proved that in September, 1842, after the judgment was obtained against Reid, the defendant Wright paid fifty dollars to the plaintiff's attorney, to be applied on the judgment, after Reid obtained his discharge, saying that he supposed he would have it to pay. There was conflicting evidence given as to the pecuniary responsibility of Reid, from the time the note became due until judgment was obtained. The testimony of Reid, who was examined on the part of the defendant, was, that he could not have paid all his debts during that period; but there were times during that period in which he could have done so, and that he thought this note could have been collected had it been sued when it became due. At that time, and afterwards, he was doing extensive business as a merchant in Amsterdam, where all the parties resided.

The declaration was on the common counts, and also on a special count upon the guaranty, showing the plaintiff's right to sue in his own name, and averring that since the guaranty aforesaid the note had not been collectable of the maker thereof. The defendant's counsel insisted that the plaintiff could not recover in his own name; as the guaranty was to his father, and not to him; that due diligence had not been shown, to collect of the maker, and that it was manifest from the evidence that if due diligence had been used, the note would have been collected of the maker. The defendant also objected to the evi-

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dence of his promise to pay, and of his request not to sue the maker, as inadmissible under the pleadings. The referee overruled these objections, and reported in favor of the plaintiff, \$148,12, the balance due on the note.

D. Wright, in person, now moved to set aside the report.

D. P. Corey, contra.

HAND, J. By the statute, (*Laws of 1835, ch. 197*), an assignee "for a valuable consideration," of a note, &c., here the assignor is dead, if there be no personal representatives of the assignor, or they refuse to sue, may sue in his own name. The assignment must be for a "valuable consideration" to bring it within this act. The use of the word "valuable," in this place, no doubt was intentional, and has meaning. It was not intended to cover cases of mere gifts. Such a disposition of dead men's estates should at least come to the notice of the executor or administrator. The difference between a valuable or meritorious consideration, and a voluntary or good one, is well understood. The former is founded on something deemed valuable, as money, goods, services and marriage. A good or voluntary consideration is founded upon natural love and affection between near relatives by blood. (4 *Kent*, 464, 465. *Hil. El. of Law*, 76. 1 *Comyn on Cont.* 8. 4 *East*, 455. 12 *Pet.* 241. 11 *Wheat.* 199. 8 *Cowen*, 406. 3 *Id.* 537. 4 *Wend.* 303. 2 *Brock. Rep.* 132. 8 *Paige*, 165. 2 *Taunt.* 69.) The words have been used in this sense in several instances, in our statutes. (2 *R. S.* 134, §§ 1, 3, 4. *Id.* 137, § 4; and see *revisers' notes to these sections*.) Courts of equity will not enforce a mere gratuitous gift or moral obligation. (*Colman v. Sarrell*, 1 *Ves. jr.* 50. *Tuffnall v. Constable*, 8 *Sim.* 69. *Flower v. Martin*, 2 *Myl. & Cr.* 459. *Story's Eq.* §§ 706, 706 a, 787, 793 a, 973, 987.) In this case the children gave bonds to the payee, each to pay him \$500 annually for life. But whether these were given in consideration of the personal property is not stated. It might have been for real estate. The testimony is,

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that this note was given to the plaintiff by his father. If this was so, this action can not be sustained. It could be assigned by parol; but as it was payable to the defendant or order, and not endorsed by the defendant, nor John Van Derveer deceased, or transferred, except by this guaranty, the plaintiff must bring himself within the statute, before he can sue in his own name; particularly upon a conditional guaranty which is properly a contract between the immediate parties thereto. (*Lamourieux v. Hewit*, 5 *Wend.* 307. *Watson's Ex'rs v. McLaren*, 19 *Id.* 557. *S. C.* 26 *Id.* 425. *Miller v. Gaston*, 2 *Hill*, 188.)

But I think there is a less technical objection to the report. The note was dated August 2d, 1836, became payable on the 5th of May, 1837, and was transferred, with the guaranty, on the 28th of September, intermediate. The note could have been collected at any time after the 5th of May, 1837, and in the years 1838 and 1839. A guaranty, that a demand is collectable, is clearly a conditional promise, binding upon the guarantor only in case of diligence. (*Loveland v. Shepard*, 2 *Hill*, 139. *Curtis v. Smallman*, 14 *Wend.* 231. *Moakly v. Riggs*, 19 *John.* 69.) It is not like an indorsement, where the indorser is primarily liable, subject to be discharged by the laches of the holder; not on the ground of non-fulfilment of the contract, but because of the supposed injury to the indorser by such neglect. Nor is it like a guaranty of *payment*, which, like that of an indorsement, is similar to a new note, but is purely a conditional promise, becoming absolute on the performance of the condition precedent. (*White v. Case*, 13 *Wend.* 543.) There is no doubt but that the neglect or delay in this case was an entire failure on the part of the plaintiff to fulfil the condition, and prevents a recovery unless the defendant has caused that delay, or has taken some other step which precludes him from making this objection. But I can not find that he had any connection with the matter from the time he gave the guaranty, until as late, certainly, as the fall of 1838, and probably not until after Van Derveer's death. Nor have I been able to find any express promise on the part of the defendant to pay it. He remarked that he expected to have to pay it,

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and he, or some one through him, paid \$50. He also, at one time, desired it might not be prosecuted. But all this was long after he was fully discharged by the neglect of the holder. Had he made an express promise, I am inclined to the opinion that the result would have been the same. A moral obligation will support an express promise ; but here there was no moral obligation. As the matter then stood, it was the same as though he had assigned the note at the risk of the assignee. His contract was performed. The debt had been lost without his fault and in violation of the condition in his contract ; and his promise, after that, was without consideration ; and besides, it was to pay the debt of another. This is not like a waiver of a forfeiture or laches. It is not a case of forfeiture, but one of mere contract, with a condition precedent which must be performed before any right of action accrues against the defendant. (*And see Stafford v. Bacon*, 1 *Hill*, 532 ; *Manrow v. Durham*, 3 *Id.* 591 ; *Tibbits v. Dowd*, 23 *Wend.* 379 ; *Eastwood v. Kenyon*, 11 *A. & E.* 438.) In *Eastwood v. Kenyon*, Lord Denman approves of the reporter's note in *Wennall v. Adney*, (3 *Bos. & Pull.* 249,) "that an express promise can only revive a preceding good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law ; but can give no original cause of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." And indeed the promise of a certificated bankrupt must be express, distinct and unequivocal. (*Fleming v. Hayne*, 1 *Stark. Rep.* 371.) Here, there was not a promise that could be enforced at law as the case then stood. The defendant never received any consideration for any new promise, and the old consideration was past and executed ; and besides, if a new promise existed, it was not counted upon in this case. (*Stafford v. Bacon*, *supra*.)

The report must be set aside.

PAIGE, P. J. concurred.

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WILLARD, J. The act of May 2, 1835, relative to voluntary assignments of choses in action, (*Laws of 1835, p. 229*), is an answer to the objection to the plaintiff's right to sue in his own name. By that statute, it is enacted that the assignee or assignees for a valuable consideration of any bond, note or other chose in action, which have been or may hereafter be assigned, if the assignor be dead and there be no executors or administrators appointed upon his or their estate, or if such executors or administrators have no interest in the things so assigned, or shall refuse to prosecute for the same, may sue and recover in his, her or their own name or names, upon bonds, notes and choses in action." The assignment of a chose in action need not be by a writing under seal; a delivery of it, for a good and valuable consideration, is sufficient. (*Prescott v. Hill, 17 John. 284. Briggs v. Dow, 19 Id. 95.*)

The obligation of the defendant, upon his guaranty, was in legal effect, that he would pay the note, provided it could not be collected of the maker, after using due diligence, by process of law to collect it of him. In general, a party who suffers a term to elapse without prosecuting the maker is guilty of laches, and loses his remedy against the guarantor. (*Moakly v. Riggs, 19 John. 69. Kies v. Tift, 1 Cowen 98. White v. Case, 13 Wend. 543. Eddy v. Stanton, 21 Id. 255. 5 Id. 307. Loveland v. Shepard, 2 Hill, 139. Cumpston v. McNair, 1 Wend. 457. Curtis v. Smallman, 14 Id. 231. Thomas v. Woods, 4 Cowen, 173. The People v. Jansen, 7 John. 332.*) The remedy, however, against the guarantor, will not be impaired, if the debtor was insolvent, and so continued, after the guaranty, and up to the commencement of the suit; nor, if the delay in prosecuting the principal debtor is at the instance of the guarantor. In the first case, the guarantor suffers no loss by the delay; and in the second he can not be permitted to turn an indulgence granted at his own solicitation, into a weapon of defense. (*Thomas v. Wood, 4 Cowen, 173.*)

The plaintiff claims that he has a right to recover, upon the ground that the omission to proceed against the principal so as to fix the defendant as guarantor, was occasioned by the request

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of the defendant ; and, also, that the defendant, with full knowledge of the plaintiff's laches, paid fifty dollars towards the judgment against the maker, recovered on the same note. The defendant, on the hearing before the referee, objected to the evidence as to the defendant's requesting the plaintiff not to sue, "*as irrelevant and improper.*" The proof of the payment of fifty dollars on the note was not objected to, at all. This objection is now, for the first time, extended to both branches of the evidence, and is expanded into the four following heads : 1st, as not being the contract declared on ; 2d, because there was no consideration for it ; 3d, because the first contract was in writing and can not be varied by parol ; and 4th, because no new contract was proved.

The first answer to the foregoing points is, that none of them were taken before the referee, either in substance or in form, as they have been urged here. The point actually taken before the referee was indefinite, and did not show wherein the proof offered differed from the pleadings. The party who takes an exception must be so specific as to remove all doubt as to his meaning, and to apprise his adversary and the court of the precise point of his objection. The court are under no obligation to modify the propositions of counsel, so as to make them suit the case, but may dispose of them in the terms in which they are proposed. (*Reab v. McAllister*, 8 *Wend.* 109, 111. 2 *Cowen & Hill's Notes*, 790, and cases.) The practice in this state is too well settled to require an examination of the cases.

The second answer is, that though the plaintiff might have declared against the defendant specially as guarantor, he was not bound to do so. As the transfer of the note by the defendant was shown to be for a valuable consideration, and so admitted to be, on its face, it was properly given in evidence under the money counts. (*Chit. on Bills*, *Springf. ed. of 1836*, p. 595, *et seq.*) In *Butler v. Haight*, (8 *Wend.* 535,) in an action against a defendant, the payee of certain notes, which he had transferred and guarantied in terms like the one under consideration, this court held, that the notes and guaranty were admissible as evidence under the common counts, they "being

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expressed to be made for value received." Even when the count is special, the better opinion is, that proving part payment, or a promise, or other equivalent act of waiver, either before or after suit brought, with knowledge of the laches, will satisfy all or any of the averments. (*Per Cowen, J. in Tibbetts v. Dowd*, 23 Wend. 384. *Williams v. Mathews*, 3 Cowen, 252, 262.) That the act of waiver is equally available, whether done before or after suit brought, was held in *Hopley v. Dufresne*, (15 East, 275.) You may, therefore, in declaring against an indorser, aver demand, notice, &c. and satisfy it by proving waiver. If this may be done when the declaration is special, much more may it be so under the common counts, where no averments of demand, notice, &c. are made. There is nothing in those objections, and the proof was properly admitted by the referee.

We are thus brought to the grounds on which the plaintiff claimed a right to recover, notwithstanding his laches in not charging the defendant by proceeding without delay to collect the note against the principal. First, as to the defendant's having occasioned the delay. It was proved that the defendant sent word to the plaintiff, requesting him not to prosecute the note, for he, the defendant, had made arrangements with Reid, the maker, to pay it. This conversation took place about two years after the note became due, and of course after the defendant was discharged by the plaintiff's laches; unless those laches were occasioned by him, or were waived. The defendant was a lawyer of distinction, and knew his rights. It is evident that he knew at that time that the note had not been sued. Whether in truth he had made any arrangements with the maker to pay it, is immaterial. The plaintiff had a right to rest on the defendant's assurances. He might well have supposed that the defendant was indemnified by the maker, and intended to pay it. It affords also persuasive evidence that the prior delay had been caused or sanctioned by him. The referee was warranted in finding the fact from the evidence in the cause, that the plaintiff's delay in suing was by the defendant's own request.

Second, as to the defendant's payment of fifty dollars. This payment was made by the defendant to the attorney of the

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plaintiff after he had obtained judgment against the maker. As the plaintiff's attorney did not receive the note for collection until February, 1840, nor obtain judgment till May, 1840, and as the payment of fifty dollars by the defendant was made on the 24th of September, 1842, he knew what steps had been taken. He requested the plaintiff's attorney, at the time he paid the fifty dollars, not to apply it then on the note, and not until after Reid had obtained his discharge in bankruptcy, "as he, the defendant, supposed he would have it to pay, and then Reid would be legally liable to him." The fact that in 1839, the defendant sent word to the plaintiff requesting him not to sue the note; and that at another time, about the same period, he inquired who was the owner of the note, saying, that "he expected to have it to pay," afforded evidence of waiver of the steps requisite to charge him. They also bear upon the question of knowledge.

In *Trimble v. Thorne*, (16 John. 152,) it was held that in order to recover against an indorser who had not been regularly charged as such, the plaintiff must show that the defendant, when he subsequently promised to pay, had full knowledge that he was discharged by the holder's laches. The court, said Spencer, Ch. J., did not mean to leave it to be inferred from the subsequent promise, that a regular notice had been given, or was intended to be waived. To the same effect is a dictum of Savage, Ch. J., in *Jones v. Savage*, (6 Wend. 658.) But the doctrine of those cases is shown by Cowen, J., in *Tibbetts v. Dowd*, (23 Wend. 379,) to be at variance with the current of authorities in England, for above a century, and of those of this country, as far back as they can be traced, and was expressly overruled. There are some cases which go to the opposite extreme, and in case of a promise to pay, throw on the defendant the double burthen both of proving laches and that he was ignorant of them. Such is *Kennon v. M'Rea*, (7 Porter, 175, 183, 184. *Nash v. Harrington*, (1 Aikin, 39, 42.) Chancellor Kent (3 Com. 113) takes the middle ground, saying, "The weight of authority is, that this knowledge may be inferred, as a fact, from the promise, under the attending circumstances,

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without requiring clear and affirmative proof of the knowledge." The cases of *Lundie v. Robertson*, (3 East, 231,) *Hopkins v. Liswell*, (12 Mass. Rep. 52,) *Burd v. Hillhouse*, (7 Conn. Rep. 527,) and numerous others, sustain the doctrine of Chancellor Kent. The referee, therefore, was authorized to find, from the payment of fifty dollars by the defendant in 1842, under the attending circumstances in the case, that the defendant had knowledge of the plaintiff's laches, and consequently that the payment was a waiver of the requisite steps to charge him as guarantor, and a ratification of the contract. All the cases have been so recently and elaborately reviewed by Judge Cowen, in *Tibbetts v. Dowd*, (*supra*,) that it would be a waste of time to go over them. In most of the cases, where a demand and notice have been waived, the action has been brought against the defendant as indorser. But in *Backus v. Shipherd*, 11 Wend. 629,) and *Burd v. Hillhouse*, (7 Conn. Rep. 523,) the defendant was sought to be charged on a guaranty, similar to the one in this suit, in both of which it was expressly adjudged that the same doctrine of waiver applies that prevails in actions against an indorser.

It is urged by the defendant that the promise, implied from the payment of fifty dollars, was without consideration and void. Bronson, J. in *Tibbetts v. Dowd*, (23 Wend. 412,) says, that as an original question, he should be of opinion, that whenever it plainly appears that there has been laches on the part of the holder, the drawer or indorser is discharged, and that a subsequent promise, though made with full knowledge, can not aid the case. But, he concedes that the rule has been settled otherwise, and whenever it becomes necessary to apply it, he should feel bound by the weight of authority. And he elsewhere observes, "that the holder may recover on proof of a promise by the indorser, with knowledge that he was not liable; not, however, on the ground that the indorser is bound by the promise, as matter of contract, for it wants consideration; but on the ground that a promise amounts to a waiver of the objection that the proper steps had not been taken to charge the indorser." There are various other cases where a party is liable on his

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promise to pay, although no new consideration be shown; such as a promise to pay a debt barred by the statute of limitations; (*Sands v. Gelston*, 15 *John*. 511;) the promise of an infant, after he has arrived at the age of twenty-one, to pay a debt contracted while an infant, and not for necessities; a promise by an insolvent to pay a debt from which he has been discharged. In these cases, no new consideration is necessary to uphold the promise. The original liability forms the aliment by which it is supported. And perhaps in each case the promise may be treated as a waiver of the protection which the law interposes in their favor. A party may waive a legal requirement made for his benefit. (*Williams v. Potter*, 2 *Barb. S. C. Rep.* 316.)

On the whole, I think the referee has decided the matter correctly, and his report should not be disturbed.

Report set aside.

SAME TERM. *Before the same Justices.*

CARLEY vs. WILKINS.

An action can not be maintained by a purchaser of chattels, against the vendor, to recover damages for a defect in the quality of the goods, unless either a warranty, or fraud, is shown.

No particular phraseology is necessary to constitute a warranty on a sale of chattels. Any assertion of the vendor, concerning the articles sold, if it be relied on by the vendee, and understood by both parties as an absolute assertion, and not merely the expression of an opinion, will amount to a warranty.

A representation made by a vendor, upon a sale of flour in barrels, that it is in quality superfine, or extra superfine, and worth a shilling a barrel more than common, coupled with the assurance to the purchaser's agent, that he may rely upon such representation, is a warranty of the quality of the flour.

Upon a warranty, a vendor is accountable for any defect, whether he knew it or not. Upon a representation merely, it is incumbent on the plaintiff to aver that the defendant knew the representation to be false. For without such knowledge he is not liable for damages.

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Selling an article as of a particular character is neither a warranty nor a representation. A different rule would abrogate the maxim of *caveat emptor*, which is the rule followed in this state.

The principle of that rule is that the purchaser has it in his power to guard against any *latent* defect or deception in the article purchased, by exacting a warranty, from the vendor. The principle assumes that both parties are equally innocent, and throws the loss upon the purchaser, for his negligence in omitting to exact a warranty.

A defendant, after having failed to demur to the complaint, or to object to the evidence, or to except to the decision of the referee in giving judgment for the plaintiff, will be held to have waived his right to object to the sufficiency of the complaint.

He can not raise the objection, upon the hearing of a case, brought in pursuance of the 223d section of the code of 1848, for the purpose of reviewing the decision of a referee upon the evidence appearing before him.

THIS action was commenced under the code of 1848. The complaint stated that the plaintiff, by his agent, on the 16th of June, 1847, purchased and received of the defendant 218 barrels of flour in closed barrels, *which the defendant sold and delivered to the plaintiff as superfine flour, Michigan mills*, at \$7,50 per barrel, which price was paid therefor by the plaintiff. That instead of such flour being superfine flour, the most of it proved, on subsequent examination, to be of an inferior quality to superfine flour, in consequence of which inferiority the plaintiff sustained damages of at least \$327, with interest from the 16th of June, 1847, which he claimed as damages, &c. The complaint was verified on the 24th of July, 1848.

The answer stated that at the time of the sale of the flour mentioned in the complaint, the defendant executed and delivered to the plaintiff's agent an instrument in writing annexed to the bill of sale of the flour, as follows:

"Inspection superfine, guarantied in Albany or Schenectady; the flour to be inspected within twenty days—to be carried under deck on canal, and inspection bill returned immediately. June 16, 1847.

R. P. WILKINS."

That the plaintiff had never caused the said flour to be inspected, nor any inspection bill to be returned to the defendant. That the said flour was, at the sale and delivery thereof to the

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plaintiff, good merchantable superfine flour. That the defendant sold the said flour as the factor or agent of A. B. Mathews, of Pontiac in the state of Michigan, which fact the plaintiff's agent, at the time of the sale, well knew. That the defendant did not, at any time, either before or after the sale, make any statement or representation as to the quality of the said flour, and that the plaintiff's agent saw said flour before the purchase thereof. And the defendant insisted that by the terms of the said instrument in writing, the plaintiff was bound to cause the said flour to be inspected within twenty days from the 16th of June, 1847, and to send the inspection bill to the defendant. The answer was verified August 15, 1848.

The reply stated 1. That the instrument in writing alledged in the answer to have been executed and delivered to the said Alexander Miller [the plaintiff's agent] was a memorandum written at the foot of the bill and receipt made out by the defendant, of the quality, description and price, and payment for said flour, and signed by the defendant only. 2. That there was no legal inspector of flour in Schenectady or Albany at the time of the sale of said flour to the plaintiff by the defendant, nor ever since. 3. That the said flour was not, at the time of the sale and delivery thereof, good merchantable superfine flour. 4. That the defendant sold said flour in his own name, and on his own responsibility, and took the draft for pay in his own name, without any reference to his being factor or agent, as stated in his answer. 5. That the defendant did, at or during the negotiation for the sale of said flour, as the plaintiff is informed and believes, state and represent that said flour was in quality extra superfine flour worth a shilling a barrel more than common, and that said Miller did not examine said flour to ascertain its quality, but took it upon the representation and assurance of the said defendant as to quality. 6. The plaintiff insisted that he was entitled to maintain this action without having caused the said flour to be inspected within twenty days from the 16th day of June, 1847, and without sending an inspection bill to the defendant.

The reply was verified on the 2d of September, 1848. The

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cause was heard before a sole referee, and he, on the 3d of March, 1849, made a report in favor of the plaintiff for \$299,16, on which, with \$85,70 costs, judgment was entered.

The report of the referee found 1. That on the 16th day of June, 1847, the defendant sold and delivered to the plaintiff 218 barrels of flour for superfine flour, "Michigan mills." 2. Said flour was bought and sold in closed barrels, and the plaintiff paid the defendant \$7,50 per barrel. 3. That the plaintiff's agent did not see or examine the flour at or before the time of sale, but took it upon the defendant's representation that it was in quality superfine, *or extra superfine, and worth a shilling a barrel more than common.* 4. That the defendant sold the said flour in his own name, and not as the factor or agent of A. B. Mathews. 5. That the plaintiff never caused an inspection bill of said flour to be returned to the defendant, but had some of it inspected. 6. That the contract of sale of the flour in question was not in writing, but was by parol, and that the instrument or memorandum in writing at the bottom of the bill of parcels and receipts was not the contract of sale of said flour, nor any part thereof. 7. That at the time of said sale, only two-tenths of said flour was superfine, one-tenth was fine, five-tenths was middlings, and two tenths was bad, being sour flour. 8. That at the time of the sale the difference in value between superfine flour and middlings was two dollars and thirty-seven and a half cents ber barrel, and the difference in value between superfine and fine flour was thirty-seven and a half cents per barrel. And the referee reported the conclusions of law as follows: 1st. That the plaintiff was not entitled to recover any thing for the bad flour, under the complaint: and 2d. That the plaintiff was entitled to recover against the defendant the sum of \$267,12, with interest from 16th of June, 1847, to the date of the report. And he therefore reported in favor of the plaintiff \$299,16, besides costs. The referee also returned the testimony at large, the whole of which appeared to have been taken without objection. At the close of the testimony, it is stated that the counsel for the defendant, among other things, insisted that the plaintiff was not entitled to recover, 1st. Because the

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complaint did not state facts sufficient to constitute a cause of action. 2d. Because it was alledged in the answer that the contract of sale of the flour in question was in writing, and was subject to a condition that the flour was to be inspected within twenty days, to be carried under deck on the canal, and the inspection bill returned immediately ; and that the plaintiff had not caused the flour, nor any part thereof, to be inspected, nor an inspection bill to be returned to the defendant. That the reply did not specifically controvert these allegations, and they were therefore admitted ; and that no evidence could be given of any other contract. It did not appear what the referee did with these objections, other than that he reported in favor of the plaintiff, as before stated.

A motion was now made to set aside the report upon a case.

J. C. Wright, for the defendant.

S. W. Jones, for the plaintiff.

By the Court, WILLARD, J. The referee has found that the flour in question was purchased by the plaintiff, without having been examined or seen by him ; that it was purchased for superfine flour, Michigan mills, upon the representation of the defendant that it was in quality superfine, or extra superfine, and worth a shilling a barrel more than common. The testimony fully warrants the referee in so finding ; and it was received without objection. The representation made by the defendant to Miller, the plaintiff's agent, was a warranty of the quality of the flour, within the decision in *Chapman v. March*, (19 John. 290.) The representation was express and direct, and the plaintiff's agent was assured that he might rely upon it.

This case is distinguishable from *Seixas v Woods*, (2 Caines' Rep. 48,) and *Sweet v. Colgate*, (20 John. 196.) In those cases the purchaser saw and examined the articles, and had as good means of knowing their qualities as the vendor. Both parties were equally ignorant of the defects. There being neither fraud nor warranty, the maxim *caveat emptor* was held applicable,

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and the purchaser was left to sustain the loss. Such, we understand to be the general rule, in this state, at the present day. Either a warranty or fraud must be shown, or the action can not be maintained. ¶ No particular phraseology is necessary to constitute a warranty. Any assertion of the vendor, concerning the articles sold, if it be relied on by the vendee, and understood by both parties as an absolute assertion, and not merely the expression of an opinion, will amount to a warranty. (*Chapman v. March*, 19 *John*. 290. *Roberts v. Morgan*, 2 *Cowen*, 438. *The Oneida Man. Society v. Lawrence*, 4 *Id.* 440. *Kinley v. Fitzpatrick*, 4 *How. Miss. Rep.* 59. *Morrill v. Wallace*, 9 *N. Hamp. Rep.* 111. *McGregor v. Penn*, 9 *Yerger*, 74.)

As the conclusion which the referee has drawn according to section 222 and 227 of the code of 1848, is a just deduction from the facts found, and as those facts were proved without objection, there does not appear to be any ground to disturb the report, upon a *case*. The 227th section of the code contemplates that the decision of a referee may be reviewed in the same manner as the decision of the court when trying a question of fact without a jury. (§ 222.) This mode of review is prescribed by section 223. It allows a decision on a matter of law, arising upon such trial, to be the subject of an *exception*, in the same manner and with the same effect, as upon a trial by jury. And it provides for a review upon the *evidence* appearing on the trial, either of the questions of fact or of law, upon a *case* containing so much of the evidence as may be material to the question to be raised. The latter mode is the one adopted on the present occasion.

It has already been intimated that there is no ground to disturb the report, as being against evidence. And it has also been seen that no question of law arose as to the admissibility of the evidence under the pleadings. At the close of the testimony it was insisted by the defendant's counsel, before the referee, that the plaintiff was not entitled to recover, for the reason, among others, that the complainant did not state facts sufficient to constitute a cause of action. That question has been repeated in

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this court, and forms the prominent ground for the motion to set aside the report.

This gives rise to two questions; *first*, as to the sufficiency of the complaint; and *second*, as to the time and manner of taking advantage of the insufficiency, if it be insufficient.

I. The complaint does not state a cause of action in *fraud*, because it fails to aver that the defendant *knew* that the flour was of a different quality from that which he professed to sell. Upon a *warranty* a party is bound to accountability for any defect, whether he knew it or not; upon a *representation* merely, it is incumbent on the plaintiff to aver that the defendant *knew* the representation to be false; otherwise he is not liable for damages. (*Per Savage, Ch. J. in Case v. Boughton*, 11 Wend. 108.)

II. The complaint does not state a cause of action upon a *warranty*. It sets out no warranty either in terms, or by equivalent words. It does not alledge that the defendant represented the flour to be of a particular quality, or that the plaintiff confided in any assurances of the defendant with respect to its quality. It has already been shown what representations amount to a warranty; and in short, that the representations proved before the referee in this action, were of that character. Nevertheless, the complaint does not contain any form of words which can be tortured into a warranty. It has been repeatedly decided that selling an article as of a particular character, is neither a warranty nor a representation. (*Seixas v. Woods*, 2 Caines, 48. *Sweet v. Colgate*, 20 John. 196.) A different rule would abrogate the maxim of *caveat emptor*, which is the rule followed in this state. The principle of the rule is that the vendor has it in his power to guard against any *latent* defect or deception in the article purchased, by exacting a warranty from the vendor; but if instead of taking this precaution, he will trust to his own sagacity and judgment, he should bear the loss. The principle assumes that both parties are equally innocent, and it throws the loss upon him who omits to exact that which would have afforded him ample protection, the exacting of which would have apprized the opposite party of the necessity of tak-

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ing measures for his own indemnity. (*Welsh v. Carter*, 1 *Wend.* 185, 190.)

III. The complaint thus being radically bad in substance, it remains to inquire at what time and in what manner the defendant can take advantage of the defect. The code of 1848, under which this pleading was drawn, (§ 122,) allows a defendant to demur, for six causes therein stated, the last of which is, that the complaint does not state facts sufficient to constitute a cause of action. Subsequent sections require the demurrer to point out distinctly the objections to the pleading, and allow the plaintiff to amend of course and without costs. Even after a decision of the court upon the demurrer, leave may be granted to the plaintiff to amend, or to the defendant to withdraw the demurrer. By section 127 it is provided that if the objection to the complaint, appearing on the face of the pleading, be not taken by demurrer, the defendant shall be deemed to have waived it, excepting only the objection to the jurisdiction of the court over the subject of the action; and the objection that the complaint does not state facts sufficient to constitute a cause of action. By omitting to demur the defendant deprived the plaintiff of the right of amendment of course, and without costs, but did not waive the objection in question. But the code is silent as to the time and manner in which the defendant, after failing to demur to the complaint, can be permitted to insist that it contains no cause of action. In determining this question we must be governed by the analogy of the former practice. (1.) The defendant might have objected to the plaintiff's proving any material fact not contained in the pleading. This would have enabled the court or referee to dispose of the question at once; or if need be, have permitted the plaintiff to apply for leave to amend. But the defendant raised no objection to the proof when it was offered; and thus, a good cause of action was proved, under a complaint containing none. The defendant could not have moved for a nonsuit on the ground of the insufficiency of the complaint. (*Kelly v. Kelly*, 3 *Barb. Sup. Court Rep.* 419.) (2.) Under the former practice a motion in arrest of judgment might have been made, within the first four days

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of the term next after the trial. (*Rule 76.*) If this practice exists under the code, it is presumed the motion must be made within the first four days after the verdict is received; (§ 220;) or within ten days after notice of the decision of the referee. (§ 223.) The motion must be made before judgment is entered. But in the present case, the defendant has suffered judgment to be entered, and he is thus precluded from moving in arrest, if that practice has not been abrogated by the code. (3.) The only remaining way of making the objection to the sufficiency of the complaint available, is by appeal. This, by section 297, can be taken from a judgment entered upon the direction of a single judge of the same court; and it is presumed from a judgment rendered on the report of a referee. (§§ 222, 223, 227, 233.) It can only be taken after judgment, and it must be made by the service of a notice in writing specifying from what part of the judgment the appeal is taken. (§275.) The clerk must, by section 276, forthwith transmit to the appellate court a certified copy of the notice of appeal and of the judgment roll: which roll it is provided by sec. 236, sub. 2, shall contain "the summons, pleadings, and a copy of the judgment, with any verdict or report, the offer of the defendant, case, exceptions, and all orders relating to a change of parties, or in any way involving the merits, and necessarily affecting the judgment. On such appeal, promoted by the defendant, the sufficiency of the complaint is put in issue, if it be made the ground of appeal. (§§ 275, 278.) It is conceived that the objection to the sufficiency of the complaint is waived, even on appeal, if the judgment appealed from is sought, in the notice of appeal, to be reversed or modified for reasons other than the defects in the complaint. Be that as it may, the defendant has not appealed in this case. He took no exception to the decision of the referee, as he might have done by § 223. He merely seeks to review the decision of the referee upon the evidence appearing before him, upon a case, in pursuance of the last clause of the said section 223. The motion is analogous to an application for a new trial upon a case, on the ground that the verdict of a jury was against evidence. Such motions are never granted unless the verdict is

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clearly against the weight of evidence. And in analogy to that practice we never disturb the report of a referee, when no principle of law has been violated, merely upon the ground that it is against evidence. (*Esterly v. Cole*, 1 Barb. S. C. Rep. 235.)

We think the question as to the sufficiency of the complaint is not properly before us at this time. The defendant having failed to demur, or object to the evidence, or to except to the decision of the referee in giving judgment for the plaintiff, has waived his right to impeach the complaint.

Motion to set aside report of referee denied.

ALBANY GENERAL TERM, July, 1849. *Wright, Harris, and Watson*, Justices.

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The mere fact that the name of a witness appears as a party upon the record is not sufficient to exclude him, if it appears affirmatively that he has no interest in the event of the suit.

The true rule is, not that a witness shall be excluded merely because he is a party to the suit, but that a party to the issue tried shall not be examined as a witness. And whenever it happens that a party upon the record is not a party to the issue upon trial, his competency or incompetency as a witness depends, as in every other case, upon the question of his interest in the event of the trial.

ERROR to the Albany mayor's court. The facts are sufficiently stated in the opinion of the court.

J. B. Staples, for the plaintiff.

F. S. Edwards, for the defendant.

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By the Court, HARRIS, J. This action was brought against the copartners of the firm of Safford, Hastings & Co. as the acceptors of several bills of exchange. Process was only served on Nathaniel Safford. John L. Safford, one of the defendants named in the declaration, voluntarily appeared in the suit and pleaded his discharge under the bankrupt act of August 9, 1841. Upon the plaintiff's application his appearance and plea were stricken out. At the trial he was offered as a witness, on behalf of the defendant Nathaniel Safford. To show him competent, on the ground of interest, his discharge in bankruptcy was produced, and also a release of all his interest in the property and effects of the copartnership of Safford, Hastings & Co. to the defendant Nathaniel Safford. The court refused to admit him as a witness, on the ground that he was a party to the suit, upon the record. The question is thus presented, whether the mere fact, that the name of a witness appears as a party upon the record, is sufficient, even though it should appear affirmatively, that he has no interest in the event of the suit, to exclude him.

Phillips states the rule thus: "A party to the suit, on the record, can not be a witness at the trial, for himself, or for a joint suitor, against the adverse party, on account of *the immediate and direct interest* which he has in the event, either from having a certain benefit or loss, or from being liable to costs." (1 *Phil. Ev.* 69.) The reason of the rule, it will be perceived, is stated to be, that the fact that he is a party to the suit is *evidence* of an immediate and direct interest in its event. It may rarely happen that this is not in fact the case. The instances are few in which a party to the suit is in no way concerned, either in the subject of the litigation, or the costs. But when such an instance does occur, will the mere fact that he is named on the record as a party be sufficient to disqualify him as a witness? It is said that "the reason of the law is the life of the law." What good reason can be assigned for excluding the testimony of a man whose name has been, with or without design, inserted in the record as a party to a suit, in which he has no conceivable interest?

No writer upon the law of evidence has ventured to lay it

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down as a distinct, independent proposition, that the mere fact that a person is named as a party on the record is sufficient ground for excluding him as a witness. Every author, that I have had an opportunity of consulting, connects the proposition with objections on the ground of interest.

Baron Gilbert, in his treatise on the law of evidence, states the general rule that no man interested in the matter in question can be a witness for himself. He then proceeds to deduce several corollaries from the rule, the first of which is, "that the plaintiff or defendant can not be a witness in his own cause, for these are the persons who have a most immediate interest, and it is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it." (*Gilb. Ev.* 130.)

Starkie says, "the rule which excludes a party from giving evidence in his own cause, is not founded merely on the consideration of his interest; if it were, it would follow that a party might always be called by the adversary to give evidence *against* his own interest. The rule is partly, at least, founded on a principle of *policy* for the prevention of perjury." (3 *Stark. Ev.* 1061.) But the same writer adds, at page 1063, that "a defendant upon the record, *who is no party to the issue tried*, may usually be examined as a witness, if he be not disqualified by interest."

The rule, as stated by Peake, is not substantially different. He says, "it may be taken as a general rule, that a party in a cause can not be examined as a witness, for he is, in the highest degree, interested in the event of it. *But where a man is not, in point of fact, at all interested, he may be examined.*" (*Norris' Peake*, 219.)

Greenleaf, too, writes to the same effect. "The general rule of the common law," he says, "is that *a party to the record*, in a civil suit, can not be a witness, either for himself, or for a co-suitor in the cause. This rule is founded, not solely in the consideration of interest, but partly also in the general expediency of avoiding the multiplication of the temptations to perjury. *The rule applies to all cases where the party has any interest*

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at stake in the suit, although it be only a liability to costs." (1 *Greenl. Ev.* §§ 329, 347.) In a note to the section last cited, the author remarks, that "in this country, where the party to the record is, in almost every case, liable to costs, in the first instance, in suits at law, he can hardly ever be competent as a witness."

I have quoted thus liberally from these standard writers, that it may be apparent how entirely they agree in assigning, as the reason upon which the rule, that parties to the record may not be witnesses, rests, their interest in the question, and the policy of the law, which, as Gilbert says, removes them from testimony; to prevent their sliding into perjury."

The adjudged cases, both in this country and in England, will be found to coincide, in their general tenor, with the elementary writers on the subject. It is true that in some instances judges have asserted in general terms, and perhaps without sufficient reflection or qualification, the general doctrine that no party to the record in a suit can be a witness; but after considerable research, I have not met with a case, nor do I think a case is to be found, where a witness, in no manner interested in the event of the suit, and who was not a party to the issue to be tried, has been excluded upon the sole ground that he was a party to the record. There are two or three cases which may, perhaps, be regarded as exceptions to the general proposition; but in every case that I have examined, the decision may be sustained without asserting the unqualified doctrine, that a party to the record, though wholly disinterested, is by the mere fact of being in the record, disqualified as a witness. I will notice the cases in our own state, in which the rule is stated in the broadest terms.

In *Schermerhorn v. Schermerhorn*, (1 *Wend.* 119,) five defendants were sued as the makers of a promissory note. They all pleaded the general issue and the statute of limitations. Two of them also gave notice of their discharges, obtained under the two-third act. Upon the trial, the discharges were produced. The court then, upon the application of the defendant's counsel, directed the jury to acquit Jessup, one of the defendants, who

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had been discharged, so that the other defendants might have the benefit of his testimony. This was done, and Jessup was then admitted as a witness for the other defendants, and proved their defence. The court undoubtedly erred in severing the issues, and directing the jury to pass upon those between the plaintiffs and one of the defendants, reserving the others for subsequent trial. In actions for torts, this is allowed, when there is no evidence at all against one defendant. In such cases it is done upon the presumption that such defendant was wrongfully included in the suit, with a view, not to recover against him, but to deprive the other defendants of his testimony. But in actions upon contract it has never been done, except when expressly authorized by statute. The mere *pleading* of a bankrupt or insolvent discharge is not alone sufficient to render a party a competent witness. It has been repeatedly held, that such a party is not entitled to a previous verdict upon his plea, for the purpose of qualifying him to be a witness for his co-defendant. This was the only point decided in the cases of *Raven v. Dunning*, (3 *Esp.* 25,) and *Currie v. Child*, (3 *Camp.* 263,) to which Mr. Justice Woodworth refers. The only other case he mentions is that of *Nordon v. Williamson*, (1 *Taunt.* 378,) which really has no bearing upon the question. There the defendant called one of the plaintiffs as a witness. He allowed himself to be sworn, though he might not have been compelled to testify. The defendant had a verdict. The plaintiffs moved for a new trial, on the ground that the testimony was inadmissible. Lord Mansfield said he could see no reason why, if a defendant was willing a plaintiff should testify, and the plaintiff was willing to give evidence against himself, he should not be suffered to do so. The conclusion was certainly very sensible, but quite obvious. I have no doubt that the case of *Schermerhorn v. Schermerhorn* was properly decided, but I do not think it can properly be regarded as an authority to sustain the position that a party to the record can, in no case, be a competent witness.

In *The Supervisors of Chenango v. Birdsall*, (4 *Wend.* 453,) the action was against a county treasurer and his sureties, upon

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his official bond. On the trial, the plaintiff called one of the sureties, a defendant in the suit, as a witness. Though objected to, on the part of the defense, he was admitted. As in *Schermerhorn v. Schermerhorn*, so here, the witness was a party to the issue on trial. He was called to give evidence to establish a cause of action against himself, as well as his co-defendant. This he ought not to have been required to do. To this extent, I admit, that considerations of policy are involved in the question. So far, I can understand what is intended, when it is said that a party is to be excluded from being a witness, on the ground of public policy. It is, to avoid the temptation to perjury, and the hardship of calling on a party to charge himself. But how does the mere fact that his name appears on the record expose the witness to this temptation or hardship, more than any other witness, when he is neither a party to the issue on trial nor interested in the event? In my judgment the true rule is, not that a party upon the record merely, but that *a party to the issue tried*, shall not be examined as a witness. Upon this distinction, founded in reason and good sense, and recognized, as I think I have shown, by all the elementary writers, the numerous decisions, apparently conflicting as they sometimes seem to be, may be reconciled. When therefore it happens, as it sometimes may, that a party upon the record is not a party to the issue upon trial, his competency or incompetency as a witness depends, as in every other case, upon the question of his interest in the event of the trial.

It is upon this distinction that the rule, every where admitted, that a defendant who pleads a matter of personal discharge, may be a witness, if the plaintiff upon receiving his plea enters a nolle prosequi as to him, is founded. Though still, technically, a party to the record, he is no longer a party to the issue. (*Butcher v. Forman*, 6 Hill, 583.) In what respect does such a party differ from one not served with process? The latter may be, and usually would be, interested in the question, but when he is not, why should he be excluded as a witness, any more than one who, having been made a party, has, by pleading a

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matter of personal discharge and the entry of a nolle prosequi, been disengaged from the trial of the issue?

The general rule, that no party to a cause can be permitted to give testimony in it, has been adhered to as steadily in Massachusetts, as any where. In *Fox v. Whitney*, (16 Mass. 118,) Chief Justice Parker said: "It has heretofore been thought sufficient to exclude such testimony that the witness is a party on record." In *Sawyer v. Merrill*, (10 Pick. 16,) it was said that a party to the record can not be a witness for a co-defendant. See also *Commonwealth v. Marsh*, (10 Pick. 57,) where it was said that the rule was not founded, exclusively, on the ground of interest, but also, on that of public policy. (*Page v. Page*, 15 Id. 368. *Vinal v. Burrill*, 18 Id. 29.) And yet, in *Gibbs v. Bryant*, (1 Id. 118,) it was decided, that the testimony of a party named in the process as a defendant, but upon whom no service was made by reason of his absence from the state, was admissible. The action was against James and Thomas Bryant as joint contractors. James alone, having been served with process, appeared in the suit. Upon the trial he offered the deposition of Thomas as evidence, and offered to show him disinterested in the event of the suit. The deposition was excluded on the ground that Thomas was a party to the record. Upon a motion for a new trial, it was insisted that Thomas was not a party to the suit, because there had been no service on him, and that he stood in the same situation as if he had not been named in the writ. In opposition to the motion it was said that Thomas was in fact a party to the record and that it would be dangerous to admit the testimony of a person so situated. The court said, "we are of opinion that the testimony of Thomas Bryant is admissible. *He is no party to the suit, because the writ was not served upon him.* His being a party to the contract is of no consequence, if he is not interested in the event of the suit."

Purviance v. Dryden, (3 Serg. & R. 402,) is to the same effect. Tilghman, Ch. J. said, "The first objection is, that the witness was a party to the suit. The writ was issued against him as well as Purviance, but he was never summoned, and

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the action, according to our practice, was carried on against Purviance alone. In fact then, the witness was not a party to the suit, and there is no force in this objection." It may be proper to remark here, that in Pennsylvania, as in New-York, where a suit is brought against several joint defendants, the plaintiff is permitted to proceed against such of them as are served with process, although, as to others, there is a return of *non est inventus*. (*Conk. Treatise, 2d ed. 76.*)

In *Le Roy, Bayard & Co. v. Johnson*, (2 *Peters*, 186,) the suit was against Jacob Hoffman and George Johnson as the drawers of a bill of exchange. The writ was returned "no inhabitant" as to Hoffman. Upon the trial, the counsel of Johnson read in evidence the deposition of Hoffman. Washington, J. in delivering the opinion of the court, said: "The only ground upon which the objection [to the deposition] can be rested is, the supposed interest of the witness in the event of the cause, since the suit having regularly abated as against Hoffman, by the return that he was no inhabitant, he was no more a party to it than he would have been, had his name been altogether omitted in the declaration."

In *Stockham v. Jones*, (10 *John.* 21,) the capias was served on Jones and Kearney, two of the defendants, and as to Jerome, the other defendant, it was returned *not found*. The plaintiff declared in trespass against the three defendants. Upon the trial, Jerome was offered as a witness for his co-defendants. He was rejected, and on a motion for a new trial it was insisted that, as it was an action for trespass, he was not liable to contribute to the amount of damages which might be recovered, and as he had not been arrested he was not a party to the cause. On the other side, it was contended that he was a co-defendant, and that no party could be a witness in the cause. It was held, that Jerome was not such a party to the suit as to disqualify him as a witness on that account, and that he had no such fixed legal interest as rendered him incompetent.

I do not think *Van Nordin v. Striker*, (9 *Wend.* 286,) can be regarded as an authority to sustain the position that a party named in the process, but not brought into court, is such a party

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to the suit as to disqualify him upon that ground alone. In that case, process was issued against Richard and George Striker. Richard was served, but George was returned not found. Upon the trial *Gabriel* Striker was called as a witness for the defence. It was alledged that he was the person intended to be sued by the name of George Striker. He was examined as to his interest, on his *voir dire*, and excluded. No opinion was delivered by the court in affirming the judgment, but it is evident, from the statement of the case, that the witness was rejected because he was interested, and not upon the ground that he was a party.

It was said by Lord Mansfield, in *Walton v. Shelley*, (1 D. & E. 300,) that the old cases upon the competency of witnesses had gone upon very subtle grounds. But that of late years, the court had endeavored, as far as possible, consistent with those authorities, to let the objection go the credit, rather than the competency of a witness. Lord Kenyon, his successor, a few years afterwards, in alluding to this remark, (*Bent v. Baker*, 3 D. & E. 32,) said, that if the opinion of so great a judge stood in need of support, it would have it, from the sentiments of Lord Hardwicke, (*Rep. Temp. Hard.* 360,) who said that whenever a question of this sort arose, on which a doubt might be raised, he was always inclined to restrain it to the credit rather than the competency of the witness, making such observations to the jury as the nature of the case should require.

In tracing the English decisions upon this subject for the last 60 years, it is interesting to observe the steady influence of the opinions of these master spirits in English jurisprudence, in gradually moulding the law of evidence, so as to relax the rule which goes to exclude witnesses, as wholly incompetent, and multiply the cases in which the objection is referred merely to their credibility. As illustrative of the progress of these views I will refer to two recent English cases. *Worrall v. Jones*, (7 Bing. 395,) was decided in the common pleas in 1831. The action was debt upon a bond executed by Edward Jones as principal, and James Jones and William Baker as sureties, conditioned for the payment of rent. Baker alone pleaded. The

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other defendants suffered a default. The cause was tried at the London sittings before Bosanquet, J. Edward Jones, one of the defendants, and the principal in the bond, was offered as a witness to sustain the defence. He was objected to on the ground that *he was a party to the record*, but the judge received his testimony. An application for a new trial was made, upon the ground that the witness had been improperly received. Tindal, Ch. J. said, "The question is, whether a defendant, who has suffered judgment by default, and who consents to be examined, is an admissible witness, where he has no interest in the event of the suit. The only objection to his admissibility is, that he is a party upon the record. Upon this question, we are of opinion that the evidence was admissible. No case has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit. Where a party who has suffered judgment by default, is called against his own interest and consents to be examined, we think there is no ground, either on principle or authority, for rejecting him.

In 1842 the case of *Pipe v. Steele* was decided in the court of king's bench. (2 *Adol. & Ellis*, N. S. 733.) The suit was against Steele and Harvey, as the drawers of two bills of exchange. Harvey suffered judgment by default. The cause was tried at the London sittings before Lord Ch. J. Denman. Harvey was offered as a witness for the plaintiffs. Though objected to, his evidence was received. Upon a motion for a new trial, the Lord Chief Justice said: "This case raises the important question, whether one of two defendants, who have suffered judgment by default, is competent witness for the plaintiff, in an action upon a contract? The objection that he is a party to the record, which prevailed in *Brown v. Brown*, (4 *Taunt.* 752;) and *Mant v. Mainwaring*, (8 *Id.* 139,) has been deliberately overruled in *Worrall v. Jones*, a case of great authority, in which Lord Chief Justice Tindal gave the unanimous judgment of the common pleas, that *a party to the record may be examined as a witness, provided he be disinterested*. After examining several authorities, he concludes by saying: "It therefore

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appears to us that the reason for excluding fails, and the witness ought to be received."

That there has been a similar tendency in the decisions in our own and other states, I think has been made apparent. I think, too, we are admonished by the recent radical change of the law of evidence in this state, not to insist upon the application of the ancient rules which would reject testimony as incompetent, beyond what established authorities imperiously require. If it be conceded that judges have entertained different opinions upon the question under consideration, and even that it is impossible to reconcile all the cases, then the only duty that remains to us is, to consider what are the principles and what the good sense to be derived from them all, and apply such principles and good sense to the case in hand.

I am of opinion that the witness should have been received, and that, for this reason, the judgment of the mayor's court should be reversed.

Judgment reversed.

SAME TERM. *Before the same Justices.*

THE TRUSTEES OF ST. MARY'S CHURCH IN THE CITY OF
ALBANY vs. CAGGER.

Secondary and even presumptive proof is admissible to fix the liability of a corporation, and to prove its corporate acts.

The omission of a corporation to make a record of its own doings, will not be allowed to prejudice the rights of a party who has, in good faith, relied upon an official assurance of its corporate act.

Accordingly, where resolutions were adopted by the trustees of a religious society, acknowledging the justness of a claim made by the plaintiff against the corporation, fixing the amount thereof, and agreeing to pay the same within a specified time, were duly certified by the secretary of the board of trustees, and transmitted to the plaintiff, who thereupon assented to the proposition contained in the resolutions, and agreed to accept the sum offered by the trustees; *Held*

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that an action would lie against the corporation, notwithstanding it had omitted to make a record of the vote of its board of trustees upon the resolutions. Held, also, that the plaintiff could recover, upon the promise contained in the resolutions, under a count upon an account stated.

A motion for a nonsuit, founded upon the objection *that the plaintiff has shown no right to recover*, is entirely too general and indefinite, and can not, therefore, be sustained.

So, if the objection is *that the evidence does not entitle the plaintiff to recover under the declaration*.

The ground relied on should be so specifically stated that the court, and the opposite counsel, may understand the real point which the defendant intends to raise.

ERROR to the Albany mayor's court. The defendant in error was plaintiff below. The action was assumpsit. The declaration contained the common money counts and a count upon an account stated. The defendants pleaded non-assumpsit, and gave notice that they would rely upon the statute of limitations. Upon the trial the plaintiff below offered in evidence the book of records of the defendants, containing the minutes of the proceedings of the trustees. It appeared from such record that at a meeting held on the 6th day of March, 1844, a committee to whom a claim of Susannah Cagger against the trustees of St. Mary's church had been referred, reported that they had examined the claim and the proofs submitted to them in support thereof, and that they found the facts substantially as follows: That William Cagger, the husband of the said Susannah, in his lifetime was one of the trustees of St. Mary's church and while a trustee became personally liable, with others of the trustees, for certain debts of the church, the whole of which, he alone was afterwards, to wit, on the 21st day of May, 1816, compelled to pay, out of his own individual property, amount in all to the sum of \$1800, to secure which the trustees gave him a deed of part of the church lot. That some time in the year 1826, the trustees of the church paid \$800 to the said Susannah Cagger on account of the sum so paid by her late husband, and from the inability of the church then to make provision for the payment of the whole sum advanced by the said William Cagger, nothing beyond the said sum of \$800 was ever paid to him or his estate, leaving still due and unpaid the sum of \$1000

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of principal, with interest from 1826, and the interest of \$1800 from 1816 to 1826, amounting in the whole to \$3520; that Bishop Hughes had advised the trustees, if they were satisfied that the claim of Mrs. Cagger was just, to pay it, though not recoverable at law, but he did not think it right to charge interest; that the committee being perfectly satisfied of the justice of the claim of Mrs. Cagger, recommended the adoption of the following resolutions:

“Resolved, That the trustees of St. Mary's church of the city of Albany, being justly indebted to the estate of William Cagger deceased, in the sum of one thousand dollars, balance of a sum of money paid by him in his lifetime out of his individual property for certain debts of said church, and for which he personally became liable while one of the trustees of said church, will repay the said sum of \$1000, with \$200 in consideration of interest, to Susannah Cagger, the widow of said William, within three years from the date of this resolution, which is to be in full of all demands against said church.

Resolved, That the secretary of the board of trustees transmit to the said Susannah Cagger a copy of this report and resolutions.”

A copy of this report and resolutions was delivered to Mrs. Cagger, with a certificate signed by the secretary of the board of trustees, that the same were true copies from the minutes of the board of trustees, adopted at a meeting of the trustees on the 6th day of March, 1844. It was also proved by the secretary that Mrs. Cagger accepted the proposition. It did not appear from the record that the report, or any resolution thereon, had been adopted by the trustees, but the secretary and one other trustee testified that the report and resolutions were adopted. The counsel for the defendants below objected to the resolutions being received in evidence, upon the ground that their adoption could not be proved by parol, and also upon the ground that they were not proper evidence under a declaration containing merely the common counts, and a count upon an account stated. These objections were overruled by the court, and the defendants' counsel excepted. These proceedings having been

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read in evidence, the plaintiff rested, and the defendants' counsel moved for a nonsuit upon the following grounds: 1. That the plaintiff had shown no right to recover. 2. That the evidence did not show that the board of trustees had adopted or passed any resolutions, and if they had, it did not entitle the plaintiff to recover. 3. That the evidence did not entitle the plaintiff to recover under the declaration in this cause. The motion for a nonsuit was denied, and the defendants' counsel excepted. The court charged the jury that upon the evidence the plaintiff was entitled to recover \$1200 with interest from the 6th of March, 1847, and the defendants' counsel excepted to the charge. The jury rendered a verdict for \$1209.33, for which sum, with \$102.64 for costs, judgment was perfected.

D. Wright, for plaintiffs in error.

R. W. Peckham, for defendant in error.

By the Court, HARRIS, J. The first, perhaps I may say the principal question presented in this case, relates to the evidence of the adoption, by the plaintiffs in error, of the report and resolutions, a copy of which was transmitted to Mrs. Cagger. It is insisted by the counsel for the plaintiffs in error that the court below erred in allowing the plaintiff there to give parol proof of such adoption. The objection was not put upon the ground that higher evidence existed in the minutes of the proceedings of the board of trustees; for it appeared affirmatively that no record was made of the vote adopting the report and resolutions. But it was contended that, no such vote of the trustees being on record, secondary evidence could not be admitted to prove that such a vote had actually been passed. I do not, however, so understand the rule of evidence applicable to the acts of corporations. Formerly, I admit, it was supposed that the acts of corporations could only be established by positive record evidence. It was once supposed that no corporate act could be binding without being reduced to writing and bearing a corporate seal. But these doctrines have long since

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ceased to be maintained by our courts. On the contrary, it is now perfectly well settled, that the acts of corporations may be proved in the same manner as the acts of individuals. If there be no record evidence, they may be proved by the testimony of witnesses, and even where no direct evidence of such acts can be given, facts and circumstances may be proved from which the acts may be inferred. Thus, in *Bank of Columbia v. Patterson's administrators*, (7 Cranch, 299,) a contract had been executed under seal between Patterson and a committee of the directors of the bank, for building a banking house. The work having been done, Patterson, instead of bringing his action against the committee upon their express contract, as he might have done, brought *indebitatus assumpsit* against the bank. It was held, upon error to the circuit court of the district of Columbia, that though an action might have been sustained against the committee personally, yet as the whole benefit resulted to the corporation, the jury might legally infer, from the evidence in the case, that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. (See also *American Ins. Co. v. Oakley*, 9 Paige, 496; *United States Bank v. Dandridge*, 12 Wheat. 64; *Perkins v. Washington Ins. Co.* 4 Cowen, 645; *Magill v. Kauffman*, 4 Serg. & Rawle, 317.) The latter case was ejectment, brought to recover land claimed by a religious corporation. The supreme court of Pennsylvania held that the acts and declarations of the trustees of the corporation, while transacting its business, and also what passed at meetings of the congregation when assembled on business, might be proved to show their possession of the land and the extent of their claim. "This," says Justice Story, in commenting upon that decision, "must necessarily have proceeded upon the ground, that the acts of corporate agents, and even of aggregate bodies corporate, may be established independent of written minutes of their proceedings." Authorities might be multiplied to show, what I regard as the well established rule, that secondary evidence and even presumptive proof is admissible

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to fix the liability of a corporation. Reason and justice alike forbid that the omission of a corporation to make a record of its own doings, should be allowed to prejudice the rights of a party, who has, in good faith, relied upon an official assurance of its corporate act. In the case at bar a copy of a report made by their own committee, to the defendants' board of trustees, and resolutions purporting to have been adopted by the board in conformity with the recommendations of that report, certified in the usual course of business by the secretary of the board, were delivered to the plaintiff. These resolutions proposed terms for the adjustment of a claim made by the plaintiff upon the defendants. It is proved that the report was made to the board of trustees. It is proved that the resolutions were actually adopted by a vote of the board. It is proved that the plaintiff, upon receiving copies of the report and resolutions, assented to the proposition contained in them, and agreed to accept the sum offered by the defendants. After this, the defendants ought not, in common fairness, to be allowed to question the validity of their own act, on the ground that they had themselves omitted to make a record of the vote of their own board of trustees. The court below, therefore, decided correctly, not only in admitting the evidence, but also in holding, as there was no countervailing evidence, that, upon this evidence, the plaintiff was entitled to recover.

The motion for a nonsuit was also properly denied. The first ground upon which the defendants relied was that the plaintiff had shown no right to recover. This was entirely too general and indefinite. The ground relied upon should have been so specifically stated that the court and the opposite counsel might understand the real point which the party intended to raise. This is due to the court, to enable it to determine the question intelligently. It is also due to the opposite party, that he may, if he can, obviate the objection by further evidence. The rule is well settled, and founded in practical wisdom. (*See Underhill v. Pomeroy*, 2 Hill, 603; *affirmed upon error*, 7 Id. 388.) But, to say that a plaintiff should be nonsuited because he has shown no right to recover, amounts to little else than to

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move for a nonsuit on the ground that the plaintiff *ought* to be nonsuited. No one can say, looking at this first ground of the motion, what question or proposition the defendants' counsel intended to present. If, as may perhaps be inferred from the argument, though certainly not from any thing in the record, it was intended to present the point that the plaintiff was not shown to be the legal representative of William Cagger, it should have been so presented as to apprise her counsel that such was the objection, that he might, if in his power, offer further proof to meet it.

The second ground of the motion is sufficiently answered by what has been said in relation to the admissibility and effect of parol evidence to prove the corporate acts of the defendants.

The other ground of the motion for a nonsuit is, I suppose, intended to raise the objection that the declaration is not adapted to the cause of action as proved. This objection, too, was so general as to bring it within the rule already stated. It is stated in very nearly the same terms as in *Underhill v. Pomeroy*. In that case it was objected that *the proof did not sustain the declaration*. It was held that the objection was too general to enable the defendant to avail himself of the point. In this case the objection is that *the evidence did not entitle the plaintiff to recover under the declaration*.

But conceding the objection to have been so taken as to present the question relied upon, I think the decision below was right. At the first I had some difficulty in applying the proof to a count for money had and received by the defendants to and for the use of the plaintiff. Nor am I prepared to say now, that such a count is adapted to the cause of action as proved. A special count would have been more appropriate. But however that may be, I am satisfied that the plaintiff was entitled to recover under the count in the declaration on *an account stated*. The acknowledgment, by the defendant, that a certain sum is due, creates an implied promise to pay the amount, and it is not necessary to set forth the subject matter of the original debt. "The present rule," says Chitty, "is, that if a fixed and certain sum is admitted to be due to a plaintiff, for which an

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action would lie, that will be evidence to support a count upon an account stated." (1 *Chit. Pl.* 358, *tit. Account Stated*. See also *Clute v. Small*, 17 *Wend.* 238; 1 *Cowen's Tr.* 234.) The resolution of the defendants was, that *being justly indebted* to the estate of William Cagger in the sum of \$1000 balance, &c. they will *repay* that sum, with \$200 in consideration of interest, *to the plaintiff*, his widow, in full of all demands. Here are all the elements necessary to sustain an action upon an account stated, and perhaps, also, upon a count for money had and received.

My opinion, therefore, is that the judgment below should be affirmed.

Judgment affirmed.

SAME TERM. *Before the same Justices.*

CARSHORE and others vs. HUYCK.

The statute requiring a justice of the peace, when removing from the town in which he was elected, to deposit his docket book with the town clerk, is merely directory; and his omission to do so, will not operate to the prejudice of a party, or prevent the docket from being received in evidence.

After a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment, as that an action of debt may be maintained upon it, with the same effect as before the statute had attached.

Where the operation of the statute of limitations is avoided by a new promise, the *old demand*, and not the *new promise*, must be the foundation of the action.

As the new promise does not, as in the case of a promise to pay a debt discharged under the insolvent act, create a new liability upon a new contract, but merely removes the presumption of payment which the statute of limitations raises, it is immaterial to whom the promise is made.

Making partial payments is sufficient to take the demand, upon which such payments are made, out of the operation of the statute.

Under a plea affirming that the debt is barred by the statute of limitations, and a replication denying that fact, any evidence tending to show that the debt is not subject to the operation of the statute is pertinent to the issue.

Proof of a new promise is therefore not only pertinent, but conclusive, upon that issue in favor of the plaintiff.

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THIS was an action of debt, tried at the Columbia circuit in December, 1848, before Justice HARRIS. The declaration was upon a judgment in favor of the plaintiff against the defendant, rendered by John Van Buren, Esq. a justice of the peace of the town of Chatham, on the 12th day of August, 1840, for \$100,47. This suit was commenced on the 23d of November, 1847. The defendant pleaded 1. *Nul tiel record*, and 2. *Actio non accrevit*, &c. The plaintiff replied to the second plea, that the cause of action did accrue within six years next before the commencement of the suit.

Upon the trial, the plaintiff's counsel, to prove the judgment, offered in evidence the justice's docket. It was admitted that the justice who rendered the judgment was no longer in office, and had removed from the town. The defendant's counsel insisted that the docket could not be read in evidence, without proof that the same had been deposited with the town clerk, as directed by statute. The objection was overruled, and the defendant's counsel excepted. The plaintiff's counsel, having proved the judgment, then offered to prove that within six years, the defendant had promised one Michael T. Smith to pay the judgment. The evidence was objected to, 1. On the ground that, under the pleadings it was inadmissible; 2. That a parol promise to pay would not revive a judgment so as to avoid the statute of limitations and enable the plaintiffs to declare on the judgment as an existing cause of action; 3. That a promise made to a third person would not be available to the plaintiffs. The objections were overruled, and the defendant's counsel excepted. The plaintiffs then proved that in a conversation with Michael T. Smith, the defendant said he had, a short time before, paid \$20 on the judgment, and would pay the rest of it when he returned from New-York; that about two weeks afterwards the defendant requested the witness to tell Smith not to commence a suit, and that he would come up soon and pay the judgment. It was proved by another witness that the defendant, in the fall of 1847, told him he had shortly before paid Michael T. Smith \$20 upon the judgment. The plaintiffs' counsel offered to prove by parol that Smith was the assignee of the

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judgment. It being admitted that the assignment was in writing, the evidence was excluded, and the plaintiffs' counsel excepted.

The plaintiffs having rested, the defendant's counsel moved for a nonsuit, upon the following grounds: 1. That there was no sufficient proof of the existence of the judgment; 2. That the evidence was insufficient to avoid the plea of the statute of limitations. 3. That a parol promise would not revive the judgment, so as to avoid the effect of the statute; 4. That under the pleadings the evidence did not entitle the plaintiffs to recover. The court denied the motion, and the defendant's counsel excepted. The evidence being closed, the court directed the jury to find a verdict for the plaintiffs for \$113,98, subject to the opinion of this court.

G. Van Santvoord, for the plaintiffs.

J. H. Reynolds, for the defendant.

By the Court, HARRIS, J. The statute requiring a justice, when removing from the town in which he was elected, to deposit his docket book with the town clerk, is merely directory. His omission to comply with this requirement could not operate to the prejudice of a party having no control over him. The justice's docket was therefore properly received.

The principal, and I think the only question in this case, is whether, after a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment, as that an action of debt may be maintained upon it. Incidentally a question of pleading is involved, but the decision of the question I have stated must determine the rights of the parties in this action. The plaintiffs maintain the affirmative of this proposition. Unless they can sustain it, their action must fail. The defendant contends, that a promise to pay a judgment, cannot entitle the plaintiff in that judgment to maintain an action upon it, as a subsisting cause of action; that a judg-

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ment once barred by the statute of limitations can not have its vitality restored by a mere promise to pay.

The question is not without its difficulty ; and neither party is without eminent authority to sustain his position. It seems, however, to be settled against the defendant, in this state. Upon a full examination of the cases in which the subject has been discussed I am satisfied that, at least in this state, the doctrine is too firmly established to be again unsettled, that where the operation of the statute of limitations is avoided by a new promise, the *old demand*, and not the *new promise*, is to be the foundation of the action. I confess that were I at liberty to reason upon the question, the inclination of my mind would be to the other side of this question. The doctrine rests for its support upon a distinction between the cause of action itself, and the remedy. The distinction is too thin and subtle to be received with satisfaction. An existing, continuing cause of action, without any remedy to enforce it, is, to my mind, a mere abstraction. To say that a man has a cause of action left, after he has lost, by the operation of the statute, his remedy upon it, seems to me little less absurd, than to say I still have my property after I have actually lost it. If a debtor obtain a discharge under an insolvent act, a subsequent promise to pay the debt discharged, is regarded as a *new contract*, supported, it is true, by the pre-existing moral obligation, as a consideration for the new promise, but to be enforced *as a new contract*, and, like every other contract, according to its own terms. The reasonableness of this doctrine is much more manifest, at least to my mind, than that which has been established in this state in respect to the revival of debts barred by the statute of limitations. The best defense of the latter doctrine, with which I have met, is contained in the opinion of Mr. Justice Mercy, in *Dean v. Hewitt*, (5 *Wend.* 257.) His argument is, that the new promise rebuts the presumption of payment upon which the statute of limitations proceeds, and has the same effect, in keeping alive the remedy, whether made *before* or *after* the statute attaches. I am unable to perceive the conclusiveness of this reasoning. In the one case, the new promise, made before the

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statute has barred the debt, arrests its course, and a new starting point is made, from which it again commences to run. It cannot be said, in that case, that the new promise *revives* the debt; for it never was *extinct*. But when the statute has once attached, the debt is *in fact*, however it may be in theory, *extinct*. It has lost all its vitality. If, afterwards, it has any "legal use or validity," it is through the reanimating principle of the new promise. And it is only useful for this purpose, as furnishing, by virtue of its continuing moral obligation, a sufficient consideration for the promise. But it would not be profitable further to examine the foundations of this doctrine. It is enough, for the present occasion, that the question is entirely settled by adjudged cases in our own courts. I cheerfully yield to their authority, and even where I cannot clearly see the reason upon which they are founded, I can say with Lord Kenyon, "it is my wish and comfort to stand *super antiquas vias*." (*See Sands v. Gelston*, 15 John. 511; *Bell v. Morrison*, 1 Peters, 351; *Depuy v. Swart*, 3 Wend. 135; *Soulden v. Van Rensselaer*, 9 Id. 293.)

The doctrine is perhaps as clearly stated in *Dean v. Hewitt* as any where else. "A demand," says Justice Marcy, "the remedy, for the recovery of which is continued or revived by a new promise, is precisely the same, after the remedy has been continued or revived, as it was before the statute had or could have attached." In that case, the action was upon a negotiable note. The new promise relied upon to relieve it from the operation of the statute of limitations, was made to the *payee*. It was held, that the negotiability of the note was co-existent with the demand, and that the remedy upon the note having been revived, while the note remained in the hands of the payee, an indorsee, to whom it had been subsequently transferred, might maintain his action upon it. The same was held in *Pinkerton v. Bailey*, (8 Wend. 600;) also in *Soulden v. Van Rensselaer*, above cited. If, then, the new promise so completely restores life, and gives effect to the original demand, as in the case of a negotiable instrument, to enable a subsequent holder, to maintain an action upon it, I think it must follow, that in

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case of a justice's judgment barred by the same statute, a new promise will enable the plaintiff in the judgment to maintain an action upon it, with the same effect as before the statute had attached. It is true, that all the cases in which the question has been presented were actions upon contract. It is only since the adoption of the revised statutes, that justices' judgments have been subject to the operation of the statute of limitations. (*Pease v. Howard*, 14 John. 479.) But if a new promise can have the effect of sustaining an action upon a negotiable security in the hands of an indorsee, to whom it has been transferred after the promise, much more should it have the effect to enable the plaintiff in a justice's judgment, to whom the promise was made, to maintain an action of debt upon it.

The objection that the promise relied upon was made to a third person, and not to the plaintiffs, can not avail the defendant. It is true, the plaintiffs failed to show that Smith, to whom the promise was made, was in fact the assignee of the judgment. But it has been held that, as the new promise does not, as in the case of a promise to pay a debt discharged under an insolvent act, create a new liability upon a new contract, but merely removes the presumption of payment which the statute of limitations raises, it is immaterial to whom the promise is made. This was decided in *Soulden v. Van Rensselaer*. See also *Oliver v. Gray*, (1 Har. & Gill, 204;) *Whitney v. Bigelow*, (4 Pick. 110.) Besides, it was proved that the defendant had paid \$20 upon the judgment, a short time before the suit was brought, and it is well settled that partial payments are sufficient to take the demand upon which such payments are made out of the operation of the statute. In *Wenman v. The Mohawk Ins. Co.* (13 Wend. 267,) it was held that the giving of a note for the interest which had accrued upon a demand was sufficient to raise a new promise to pay the demand, and thus prevent the operation of the statute of limitations.

But it is insisted, that the evidence of a new promise, if it could operate to take the case out of the statute at all, could only have been given in support of an issue made in the pleadings upon such promise. But here too, I must dissent from the

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position assumed by the defendant's counsel. The issue tendered by the plea and accepted by the replication, was upon the statute of limitations. The defendant affirmed, in substance, that the debt was barred, and the plaintiff denied it. Any evidence tending to show that the debt was not subject to the operation of the statute, was pertinent to the issue. The proof of a new promise, upon the principles already noticed, was not only pertinent, but was conclusive, upon that issue, in favor of the plaintiffs. This mode of pleading is approved by Chitty, (1 *Chit. Pl. 8th Am. ed. Spring. p. 583*,) and is, so far as my experience extends, the form uniformly adopted in similar cases. (See *Tompkins v. Brown*, 1 *Denio*, 247.)

Upon the whole case, therefore, the plaintiffs are, in my opinion, entitled to judgment.

Judgment for the plaintiffs.

SAME TERM. *Harris, Watson, and Parker*, Justices.

THE CHAUTAUQUE COUNTY BANK vs. WHITE.

A common law receiver is a person appointed by the court to receive the rents, issues and profits of land, or any other thing in question in the court of chancery, pending a suit, where it does not seem reasonable to the court that either party should receive them.

He is appointed to protect some fund during the litigation, and has no powers, except such as are conferred by the order for his appointment; and the course and practice of the court.

The court of chancery has no power, upon a creditor's bill, to order the *real estate* of a judgment debtor to be sold to satisfy the judgment.

Nor will an assignment of all his property, real and personal, to a receiver, executed by the judgment debtor under and in obedience to an order of the court, vest the legal title to the real estate in the receiver, so as to authorize the court to direct him to sell such real estate and apply the proceeds to the payment of creditors having liens thereon.

Such an assignment will not so effectually divest the judgment debtor of his title

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to the real estate as to prevent a judgment subsequently recovered against him from becoming a lien thereon.

And the purchaser at a sale under such judgment will acquire a legal title to the real estate of the debtor; notwithstanding a sale of such property by the receiver in the creditor's suit, made in pursuance of an order of the court.

If the purchaser at the receiver's sale has received a conveyance of the premises, the person purchasing the property at the sale under the judgment has a right to the aid of the court of chancery to remove the cloud cast upon his title by the conveyance from the receiver.

A person who, being himself the owner of property, stands by and sees another sell it as his own, without objection, will not be allowed afterwards to assert his title. His silence, when, in good conscience, he ought to speak, shall close his mouth when he would speak.

Accordingly, where a person, at a receiver's sale of real estate, represented, or induced the receiver to represent, that the property was encumbered greatly beyond its utmost value, and that he who purchased would acquire only the right to the use of the property until a legal title could be perfected under the incumbrances; by means of which representations all competition was prevented and such person purchased the property at a merely nominal price; *Held* that he was concluded by the representations made by him, and estopped from denying that the judgments mentioned at the receiver's sale were then existing liens upon the land purchased by him.

IN EQUITY. On the 19th of September, 1837, John Z. Saxton, having been extensively engaged in mercantile and other business, and being insolvent, made an assignment of his property to Pearson Crosby and John Crane, in trust for the payment of his debts. By the terms of the assignment the debts to be paid were divided into four classes, which were to be paid in the order specified. The first class amounted to \$5523,00, and embraced two notes due to the plaintiffs, amounting to \$2800. The second class consisted of all other debts which Saxton had contracted on his own account, and was estimated at \$14,548,87. The third and fourth classes included his liabilities for others. On the first day of October, 1837, Saxton conveyed to his assignees all his real estate, in trust for the same purposes expressed in his assignment.

On the 4th of November, 1837, Webb & Douglass, creditors of Saxton, whose debt was included in the second class, recovered a judgment against him in the supreme court for \$646,32. On the 28th of September, 1838, they filed a bill in chancery

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against Saxton and his assignees, to set aside the assignment and trust deed, on the ground that the same were fraudulent and void. The bill having been taken as confessed by the defendants therein, a decree was made on the first day of November, 1838, declaring the assignment of the 19th of September, 1837, fraudulent and void, and directing the appointment of a receiver, *with the usual powers and authority*, and that the defendant Saxton assign, transfer, and deliver over, on oath, to such receiver, all the money, equitable interests, property, things in action, rents, real estate and effects, which were in his possession, custody or control at the time of the service of the injunction upon him, except such property as was by law exempt from execution ; and also that the defendants Crosby and Crane assign, transfer and deliver over to the receiver, all the money, equitable interests, property, things in action, rents, real estate and effects held by them, under any assignment or deed in trust executed to them by Saxton ; and that the receiver, out of the moneys he should receive, should pay the amount of the judgment and the complainants' costs. On the 19th of December, 1838, the decree was vacated as to the assignees, and they were let in to defend the suit. Ebenezer A. Lester was appointed a receiver under the decree of the first of November, and on the 5th of January, 1839, Saxton executed an assignment to the receiver pursuant to the decree "*to have and to hold the property assigned to the receiver according to the said decree and order and the laws of this state.*" On the 19th of June, 1839, an order was made directing John Crane, one of the assignees, to transfer to the receiver all the property and effects in his hands as assignee ; in pursuance of which, on the 9th of September, 1839, he executed to the receiver an assignment of all the property claimed by him under the assignment of the 19th of September, 1837, or the deed of trust of the first of October. Crane put in an answer, and the bill was again taken as confessed by the defendant Crosby, he having removed from the state. The cause having been heard by Vice Chancellor Cushman, a decree was made on the 29th of February, 1840, declaring the assignment and deed of trust *fraudulent and void*, and

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directing the receiver to "advertise and sell for cash, at public auction, the real estate conveyed or assigned to him under said orders, *subject to the liens and incumbrances thereon*, at the risk of the purchaser, on giving six weeks' notice," &c. ; and that the receiver convert the personal property into money and apply the proceeds of said real and personal estate "to the satisfaction of the decrees of the respective complainants according to the priority of the filing of their respective bills, in suits in which he had been, or should be, appointed receiver."

On the 2d of June, 1838, Charles Barker recovered against Saxton and others a judgment for \$557,12. And on the 3d of November, in the same year, he also filed a bill against Saxton and the assignees, to set aside the assignment; and, the suit having been ordered to abide the event of the suit in which Webb & Douglass were complainants, a decree was made on the 9th of April, 1840, similar in all its provisions to that made in the case of Webb & Douglass.

On the 6th of May, 1839, five other judgments were recovered against Saxton, by other creditors, amounting in the aggregate to \$3323,71. And on the 11th of May, 1839, the plaintiffs in these judgments also filed a bill to set aside the assignment, and on the 9th of April, 1840, a decree was entered in that suit declaring the assignment and deed of trust fraudulent and void, and containing the same directions and provisions as the decrees in the other suits. The defendant in this suit was the solicitor for the complainants in all the bills filed against Saxton and his assignees, and attorney for the plaintiffs in all the judgments except that of Webb & Douglass.

On the 25th of March, 1840, the receiver published a notice, entitled in the suit of Webb & Douglass, stating that, as receiver in that suit, he would sell at public auction, on the 7th of May, certain lands, describing the real estate of Saxton, "*which sale was to be entirely for cash, and the lands sold subject to the liens and incumbrances thereon, at the risk of the purchasers.*" The notice was prepared by the defendant, and sent to the receiver, with instructions to sell the real estate at the earliest possible day. Preparatory to the sale, a certificate of one of the

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clerks of the supreme court was procured, containing a statement of judgments against Saxton. The aggregate amount of the judgments mentioned in the certificate was \$19,451.37. Of these judgments, one in favor of the plaintiffs in this suit against Saxton and others for \$1260 was docketed prior to the execution of the assignment by Saxton. Three other judgments, besides those in favor of Webb & Douglass and Charles Barker, amounting to \$878.84, were docketed between the time of the assignment by Saxton to Crosby and Crane and his assignment to the receiver. Four other judgments, including one in favor of the plaintiffs in this suit for \$2236.67, and together amounting to \$4936.16, were docketed on the 7th of January, 1839. At the sale the receiver read his printed notice of sale and that portion of the decree which required him to sell subject to liens, and stated publicly that he should sell subject to previous liens, and exhibited the clerk's certificate *as containing a statement of such liens*. A share of stock in the Van Buren Harbor Company, and two lots which had been conveyed to the assignees in payment of a debt, were sold separately, and purchased by the defendant for \$85. The residue of the real estate, consisting of various village lots and other parcels of land, were sold together and bid off by the defendant for \$238. The defendant was the only bidder. It was understood by the defendant and the receiver, at the time of the sale, that the judgment for \$1260 docketed prior to the assignment was against Crosby as principal and Saxton as surety, and that it would be collected of Crosby. It was also understood that another judgment appearing upon the certificate for \$137.55 was paid. They made an estimate of the amount of the liens upon the property. The amount prior to the 8th of January, 1839, was about \$7000. They concluded that the property was not worth more than the liens upon it. They then estimated what the use of the property would be worth for 15 months, the period which would elapse before a purchaser at a sheriff's sale would acquire title. The defendant bid about the amount of this estimate. In making up the amount of the liens upon the property the judgment of \$2236.67 in favor of the plaintiffs was considered by the re-

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ceiver and the defendant as a lien upon the property. A witness testified that, at the time of the sale, he understood from both the receiver and the defendant that the purchaser would only get the right to the use of the property some 15 months. A letter was also produced in evidence, written by the defendant to the receiver, under date of April 4, 1840, which contains a copy of what the defendant calls "Crane's sworn valuation of the real estate." It amounts to \$4612. He then proceeds to say, "If this valuation be true, as I think it is, it will be *mere form* for you to sell it, as it is worth nothing above the judgments, which are liens upon it, beyond the value of the use of it for one year, as the purchaser can hold it only as long as Saxton could after a sale by the sheriff on an execution. So the whole real estate will remain after your sale, a *bone* for the creditors who will redeem over each other until it is run up to about \$4612, or such other amount as it is supposed to be worth. This being the case, you will put up the whole together, and it will bring its value *to use* for one year, which ought to be as much as four or five hundred dollars. I am getting a transcript of all judgments in the supreme court against Saxton, and you would do well to get those in the county clerk's office, *so that purchasers may know all the liens*. You need only get a search since August, 1837, as then Saxton cleared off all incumbrances to get some of the surplus loan." On the 11th day of May, 1840, the receiver executed to the defendant a deed, containing recitals setting forth the various proceedings in the suit of Webb & Douglass against Saxton and his assignees, and conveying to the defendant, his heirs and assigns, the real estate purchased by him at the sale. When the decree in favor of Barker was entered, on the 9th of April, 1840, the receiver had in his hands money more than sufficient to pay that decree and the decree in favor of Webb & Douglass. The amount due Webb & Douglass upon their judgment had been paid by the receiver, on the 9th of March, 1840; and the costs of the suit in chancery were paid on the day of the receiver's sale. The whole amount paid by the receiver upon the three decrees was \$4243,76. On the first day of April, 1840, the sheriff of

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Chautauque advertised the same lands described in the receiver's notice of sale, to be sold, under an execution issued upon a judgment for \$393,12, recovered by one Morris Adams against Saxton on the 27th of July, 1838. The sale took place on the 30th of May, when the defendant in this suit bid off a portion of the premises for \$450, a sum sufficient to satisfy the execution. The plaintiffs in this suit subsequently redeemed the property thus purchased by the defendant. On the 18th of July, 1840, all the premises purchased by the defendant at the receiver's sale, except the lot sold on the 30th of May by virtue of the execution in favor of Morris Adams, were sold under an execution issued upon the plaintiff's judgment recovered on the 7th of January, 1839, and purchased by the plaintiffs for \$2000, and on the 14th of January, 1842, they received a sheriff's deed of the premises so purchased.

On the 26th of August, 1841, the defendant paid \$169,41 in satisfaction of a judgment recovered by Albert H. Porter against Saxton on the 7th of May, 1838, and on the 9th of September, 1841, the defendant obtained an assignment of another judgment recovered by Lewis Peck and John P. Redner on the 7th of May, 1838, for \$348,17. The judgment for \$1260 in favor of the plaintiffs, docketed on the 8th of July, 1837, was satisfied on the 19th of March, 1841, by a sale of Crosby's property. A mortgage executed by Saxton upon one of the lots purchased by the defendant at the receiver's sale had been foreclosed, and the premises sold on the 2d day of December, 1839. On the 12th of January, 1842, the defendant paid to the purchaser \$179,07, and received a conveyance of the lot so sold.

The plaintiffs filed their bill on the 17th of August, 1842, praying that their judgment might be decreed to be a lien upon the premises purchased by them, from the time it was docketed, and that their title under the sheriff's sale might be declared superior to the defendant's title derived from the receiver; and further, that the defendant might be required to surrender the possession of the premises to the plaintiffs, and account for and pay over to the plaintiffs the rents and profits of the premises from the time they became entitled to the possession.

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The defendant put in his answer in which he claimed that by virtue of his conveyance from the receiver he acquired the legal title to the premises, and claimed protection as a bona fide purchaser. The case was heard upon pleadings and proofs, by the vice chancellor of the third circuit, who, on the 2d day of August, 1844, made a decree dismissing the plaintiff's bill with costs. From this decree the plaintiffs appealed.

C. Tucker, for the plaintiffs.

M. T. Reynolds, for the defendant.

HARRIS, J. by the terms of the sale, under which the defendant claims title to the premises in question, the purchaser was to take his title subject to the liens and incumbrances thereon. And that those who attended the sale might be apprised of the extent of such incumbrances, a schedule of judgments was exhibited, to the amount of about \$20,000. The sale was conducted under the direction of the defendant; and it must be presumed that it was with his knowledge and approbation that those present at the sale were informed, that the purchaser of the lands to be sold, must take the property charged with this formidable amount of judgments. The defendant must himself admit, that when he purchased he supposed all these incumbrances actually existing and chargeable upon the property. This conclusion is necessary, for the vindication of his integrity in the transaction. For, if he then believed that the purchaser would hold the premises subject only to the lien of such judgments as had been docketed prior to the assignment by Saxton to the receiver, it was a gross fraud for him to have it understood by all attending the sale, except himself, that all the judgments then outstanding against Saxton, were incumbrances upon the property. The defendant knew then, that Crosby was primarily liable for the payment of the \$1260, for which judgment had been recovered against Saxton. He knew that the Webb & Douglass judgment had, in fact, been paid. He also knew that the receiver then had actually in

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hand, money much more than sufficient to satisfy the Barker judgment. So that if the position now assumed by the defendant, that no judgments docketed after the assignment by Saxton to the receiver, became liens upon the property, be sustainable, the only real incumbrances to be paid out of the property as prior liens thereon were three small judgments, amounting together to less than \$900. If this were so, and the defendant knew or believed it, he was bound in fairness to have had those who attended the sale, correctly informed in respect to the nature and extent of the incumbrances. At the least, he was bound to see that they were not incorrectly informed.

But I think the defendant took a more correct view of the question, in his letter of the 4th of April, 1840, than he seems to have entertained since he became the purchaser. He then believed, and acted upon the belief, so at least I must assume, that all the judgments which had been recovered against Saxton, were liens upon the real estate. Hence he said to the receiver, that it would be *mere form* for him to sell; that the property was worth nothing above the judgments, except the value of the use of it, until a title could be perfected under a sheriff's sale; and that after the sale by the receiver, the whole real estate would remain "*a bone*" for creditors, who would redeem over each other, until it should be run up to the amount of \$4612, or such other amount as it might be supposed to be worth. I am inclined to concur with the defendant in the correctness of this opinion. The receiver was, what Chancellor Walworth, in *Verplanck v. The Mercantile Insurance Co.* (2 Paige, 452,) called a common law receiver. Such a receiver is defined to be a person appointed by the court, to receive the rents, issues and profits of land or any other thing in question in the court of chancery, pending a suit, where it does not seem reasonable to the court that either party should do it. (*Wyatt's Prac. Reg.* 355.) He is appointed to protect some fund during the litigation, and has no powers, except such as are conferred by the order for his appointment, and the course and practice of the court. (2 Paige, 452, *above cited*.)

I propose, therefore, in the first instance, to inquire what has

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been the course and practice of the court of chancery, in this state, and what is the power conferred upon it by law in such cases, with a view to a correct determination of the question, whether the judgments recovered after the assignment to the receiver, were in fact liens.

In *Hadden v. Spader*, (20 John. 554,) the doctrine, which had previously been held by Chancellor Kent, was settled by the court for the correction of errors, that a judgment creditor, whose execution had been returned unsatisfied, might file his bill in chancery, to have his judgment satisfied out of the equitable interests of the debtor which could not be reached by execution, and that the commencement of such a suit gave the creditor a lien upon such equitable estate of the debtor. In *Edmeston v. Lyde*, (1 Paige, 637,) the chancellor extended this principle, so as to reach an equitable interest of the debtor in real estate. This decision was made just before the revised statutes took effect. The doctrine of *Hadden v. Spader* having been questioned in *Donovan v. Finn*, (1 Hopkins 59,) the revisers, with a view as they state, to preserve the rule as laid down in that case, proposed to introduce it into the statutes. Two sections were accordingly reported, which provided for the filing of a bill upon the return of an execution unsatisfied, "to compel the discovery of any property, or thing in action, belonging to the defendant, and of any property, money or thing in action, due to him or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant," and further declaring that "the court should have power to decree satisfaction, &c. out of any property, money, or things in action, belonging to the defendant, or held in trust for him, which should be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution or not. The legislature amended the latter section as prepared by the revisers, by inserting the word "*personal*" before "*property*," and as thus amended, adopted it. The fact that the court is thus authorized, in terms, to decree satisfaction, &c. out of *personal property*, would probably of itself be sufficient to justify the in-

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ference that it was not intended to confer the same power in relation to real estate. The maxim that *expressio unius est exclusio alterius*, would, I think, be applicable in the construction of the section, and restrict the court to the terms of the statute. But however this may be, the fact that the legislature, when the provision was presented to them in terms broad enough to embrace real estate, inserted the word "*personal*," shows, I think, very satisfactorily, that it was not intended that the court of chancery should have the power to decree satisfaction of a judgment out of the *real estate* of the debtor. (See 2 R. S. 174, § 38, 39, and *Revisers' report*.) There was no necessity for conferring such a power. If the debtor interposed fraudulent obstructions in the way of the satisfaction of his judgment creditor by a sale of his real estate upon execution, the creditor might resort to the court of chancery to aid him in removing such obstructions. This being done, the property might be sold upon execution, and the right of redemption preserved to the defendant and other creditors. Ever since the passage of the redemption act, in 1820, it has been the policy of the legislature to preserve and extend its beneficial effects. It would not therefore, adopt a provision which, as has been attempted in the case now before the court, might enable the creditor, by resorting to a court of chancery, to become the purchaser of his debtor's real estate at an absolute sale for a nominal price, at the expense of other creditors. The benign operation of the law allowing a right of redemption for a limited period after the sale of real estate, is well and forcibly stated by the chancellor, in *Farnham v. Campbell*, (10 Paige, 598.)

The course and practice of the court of chancery will be found to correspond, uniformly I think, with the power thus conferred by the legislature. The court has never, within my experience, asserted its power to decree the sale of the real estate of a judgment debtor to satisfy the judgment. In a case which recently came before this court, at a general term in the fifth judicial district, Mr. Justice Gridley holds the following language: "It is not within the scope and object of a creditor's bill, properly so called, to direct a sale of the real estate of the judgment debtor.

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Its object is to compel the 'discovery of any property, or thing in action, belonging to the defendant, and to prevent the transfer of such property;' and the court is authorized by the statute, to compel such discovery, to prevent such transfer, and 'to *decree satisfaction* of the judgment out of any *personal property, money* or things in action, belonging to the defendant or held in trust for him.' The term 'land,' or 'real estate,' is not found in the act. When, however, there is any impediment, such as a fraudulent conveyance, interposed to prevent the collection of a debt, so as to give the party a right to invoke the jurisdiction of the court of chancery in aid of an execution at law, it is allowable to embrace this ground of relief also in a creditor's bill. The legitimate relief upon such a bill, so far as the real estate is concerned, is attained when the unlawful obstruction is removed, and the creditor is thus enabled to obtain satisfaction of his judgment by a sale under an execution at law. The provisions of the revised statutes already adverted to, were merely declaratory of the powers which the court of chancery possessed and had exercised before their enactment." (*Scouten v. Bender*, 3 *Howard's Sp. T. Rep.* 185. And see *Hendrickson v. Winne*, *Id.* 127.) It is true that Justice Gridley adds, in his opinion, that he does not doubt that the court may, in some cases, lawfully direct a sale of the real estate of the judgment debtor, and that in many instances it is the most advisable course to be pursued. I shall have occasion to notice this remark more particularly presently. *Tompkins v. Fonda*, (4 *Paige*, 448,) presented the same question. An application was made for a receiver upon a creditor's bill. The only property of the defendant was her interest in a farm of which her husband had died seised. Her dower had never been demanded or assigned to her. The only question presented to the court for its decision, was whether this was such an interest as could be reached by the aid of the court of chancery, after the return of an execution unsatisfied. The court held that the defendant's interest in the land of her deceased husband, before assignment, was not an estate which could be sold upon execution, but was a mere right or chose in action, and therefore might be reached

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by a decree of that court and applied to the satisfaction of the judgment against the defendant. See also *McElwaine v. Willes*, (9 Wend. 560,) where Justice Nelson, in the court for the correction of errors, seems to assume that the judgment creditor has a right to claim the interposition of the equitable powers of the court of chancery to aid him in the collection of his debt only out of assets of the defendant *not liable to execution*. Also *Le Roy v. Rogers*, (3 Paige, 234.) In that case it was held that the plaintiff in a creditor's bill was entitled to a discovery of all the property, both real and personal, which the defendant owned, whether in this state or elsewhere. And the chancellor states, as a reason why the plaintiff should have such discovery, that if the property should be in this state, it might afterwards be reached *by an execution out of that court*, and if elsewhere, the defendant might be compelled to transfer it, by a proper conveyance to a receiver, to be sold and applied to the payment of the plaintiff's debt. This is upon the ground, as stated by Mr. Hoffman in his excellent book upon chancery practice, that the defendant's right to lands in another state or country must necessarily be of an equitable character, even where the title would be clearly legal, if they were situated in this state. (2 Hoff. Ch. Pr. 115.) Upon the subject now under examination that author further remarks, that "if the real estate is within this state and of a legal nature so that a judgment at law binds it, and an execution can be issued, *this court will reach it by authorizing an execution to be issued from the court of law*. And, as to real estate vested in the defendant at the date both of the judgment and decree, a decree being obtained for the payment of the amount, it is within the *power of the court to issue an execution* and have the property sold. (2 R. S. 183, § 110.) "This sale," adds Mr. Hoffman, "must, I suppose, be *subject to all previous judgments*." But why sell the property upon an execution to be issued upon the decree? Obviously for the reason that, while the legislature have authorized the court to decree satisfaction of the judgment by a sale of personal property, it has not authorized the same thing to be done in respect to real estate.

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But it is said that by the assignment executed by Saxton, on the 5th of January, 1839, the legal title to his real estate was vested in the receiver, and it is insisted that, though the court might not have power to decree satisfaction of the Webb and Douglass judgment by a sale of Saxton's real estate, it had the right, having acquired the title by a voluntary conveyance from Saxton to the receiver, to direct the receiver to sell the property so conveyed to him and apply the proceeds to the payment of the creditors having liens upon it. This view seems to be entertained by Justice Gridley in the opinion to which I have before referred. He says, "where the judgment debtor has assigned to a receiver *his real* as well as personal estate, for the benefit of his prosecuting creditor, and the court has removed the fraudulent deed that covered it, *and when all the parties who have acquired any lien upon it are before the court,*" he could see no objection to a sale by the receiver, and a distribution of the proceeds among the creditors according to the priority of their liens. In that case, all the parties interested in the lands had consented to a sale by the receiver, and the question before the court related merely to the priority of their liens. But I am not disposed to dissent from the views thus expressed by Justice Gridley, and will therefore proceed to examine the effect of the assignment of the 5th of January, 1839.

By the decree of the first of November, 1838, which was the only order or decree made against Saxton in the Webb & Douglass suit, the assignment which had been executed to Crosby and Crane, was declared void, and a receiver was directed to be appointed, who was to possess *the usual powers and authority*. And when such receiver, with such powers and authority, should be appointed, Saxton was required to "*assign, transfer and deliver over* on oath to such receiver, all the money, equitable interests, property, things in action, rents, real estate and effects, *which were in his possession, custody or control*, at the time of the service of the injunction. Was it the intention of the court, I ask, in view of what we have seen of the power conferred upon it, and its uniform course and practice in such cases, to clothe the receiver to be appointed with *power*

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and authority to invest himself with the legal title to the real estate of Saxton? Did it intend that Saxton, in obeying the order, should divest himself of such legal title? I think not. The court intended, so far as the real estate was concerned, that the receiver should be invested with the necessary power and authority to secure, pending the litigation, the rents and profits. Saxton and his assignees, who were decreed to have no title, were alike required to assign, transfer, and deliver over to the receiver, not the real estate, of which Saxton was the owner, or the legal title to which was vested in him or them, but the real estate in their possession or control. The decree evidently looked to the execution of an instrument which should have the effect to put the receiver in possession of the property, and nothing farther. Hence it is, that though the decree is final, no provision whatever is found in it for any sale or other disposition of the real estate. In obedience to this decree, the assignment of the 5th of January, 1839, was executed. It purports to have been made in pursuance of the decree and in consideration thereof. In its terms, it follows the language of the decree, and then declares that the receiver is to hold the property thus assigned to him, "according to the said decree or order and the laws of this state." I admit that the words of the instrument are sufficient to operate as a conveyance, if it was so intended. But it is the duty of courts, in the construction of every instrument conveying an estate, to carry into effect the intent of the parties. Though the word "assign" and "transfer," may either of them have the effect to convey, when so intended, yet neither necessarily implies such intention. (4 Kent's Com. 5th. ed. 491, note a.) My conclusion, therefore, is that the assignment executed by Saxton to the receiver did not so effectually divest him of his title to the real estate in question, as to prevent the plaintiff's judgment recovered after the execution of such assignment from becoming a lien thereon. If I am right in this conclusion, it follows that the plaintiffs, by the sale under their judgment, acquired a legal title to the property, notwithstanding the receiver's sale under which the defendant claims to hold it.

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But if I am wrong in this conclusion, there is still another ground upon which I think the defendant's claim to the property as against the plaintiffs, must fail. It is the principle which will not allow a man, who, being himself the owner of property, stands by and sees another sell it as his own, without objection, afterwards to assert his title. His silence, when in good conscience he ought to speak, shall close his mouth when he would speak. So, here, the defendant represented at the sale, or if he did not, he induced the receiver to represent, that the property was incumbered greatly beyond its utmost value, and that he who purchased would acquire only the right to the use of the property until a legal title could be perfected under the incumbrances. All who attended the sale, including, I must suppose, the defendant himself, believed these representations to be true. All acted upon their truth. The result was, that the defendant purchased the property at a merely nominal price. There were those interested in the estate, present, but not a bid was made against the defendant. The sale was, in fact, what the defendant in his letter to the receiver had represented it would be, a *mere form*. The defendant can not now complain, if he is held concluded by the representations then made, at his own instance, and which deterred others from bidding, and enabled him, at a single bid, for an insignificant price, to sweep off the entire estate of Saxton, which ought to have been applied to the satisfaction of his honest debts. Whether the defendant believed the statements made at the sale, or not, can not vary the legal, though it may the moral character of the transaction. If he then believed that all the judgments against Saxton were liens upon the property, and purchased under that belief, he ought to be willing now to occupy the same position upon which he then chose to stand. If he did not believe it, then he deliberately practiced a gross imposition, both upon the receiver himself and all who were interested in the sale. In that case, every principle of common justice would forbid the court to allow him to reap the fruits of such an imposition. In either view of the question, the defendant has already obtained all the benefit from his purchase which he can justly claim, and

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must be held to be estopped from denying that the judgments, a schedule of which was exhibited at the sale, were then existing liens upon the property purchased by him. (*Dezell v. Odell*, 3 *Hill*, 221.)

I think, too, that the plaintiffs had a right to ask a court of equity to remove the cloud upon their title which the receiver's conveyance to the defendant had created. Whether a bill in equity can be maintained to avoid an instrument, to which there is, appearing upon its face, a valid legal objection, on the ground that, though void, it tends to cast a cloud over the plaintiff's title, is a question by no means well settled. Chancellor Kent, in *Hamilton v. Cummins*, (1 *John. Ch.* 517,) holds the affirmative of this question. He says, the weight of authority and the reason of the thing are equally in favor of the jurisdiction, whether the instrument is, or is not, void at law, and whether it is void for matter appearing upon its face, or from extrinsic proof. Justice Story maintains the same position. "Whatever may have been the doubts or difficulties formerly entertained upon this subject," says he, "they seem by the modern decisions to be fairly put at rest, and the jurisdiction is now maintained in the fullest extent." (2 *Story's Equity Juris.* § 700.) Chief Justice Nelson, in delivering the opinion of the court for the correction of errors, in *The Mayor, &c. of Brooklyn v. Messerole*, (26 *Wend.* 132,) seems also to concede the jurisdiction of the court in such cases. On the other hand, Chancellor Walworth, in *Van Doren v. The Mayor, of New York*, (9 *Paige*, 388,) asserts that, where a valid legal objection appears upon the face of the proceedings through which the adverse party can alone claim any right to the complainant's land, it is not in law such a cloud upon the complainant's title as will authorize a court of equity to interfere. In *Piersoll v. Elliot*, (6 *Peters*, 95,) Chief Justice Marshall, referring to this question, says: "The court forbears to analyze and compare the various decisions which have been made on this subject in England, because, after considering them, much contrariety of opinion still prevails on the question of general jurisdiction where the instrument is void at law on its face. The inclination of my

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own mind is, I admit, against entertaining jurisdiction in such a case, but *non mihi tentas componere lites*.

However the question may be determined, all the authorities agree in conferring jurisdiction where the claim, whose shade is cast upon the plaintiff's title, is not utterly void upon the face of the instrument itself, but is shown to be so by extrinsic evidence, or where it is shown to be against good conscience to allow the party to set up his claim against the plaintiff's title. "Such jurisdiction," says Story, "is founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice." (*See cases above cited; also Pettit v. Shepherd*, 5 Paige, 493.) Unless, therefore, I have wholly mistaken the principles upon which this case depends, the plaintiffs had a right to appeal to a court of equity for relief against the inequitable claim of the defendant, and have established their right to such relief.

My opinion is, that the decree appealed from should be reversed, and a decree should be entered, declaring that the plaintiffs' judgment, at the time of the receiver's sale, was a lien upon the lands purchased by the defendant at such sale; that, by the sale on the 18th of July, 1840, under the plaintiffs' judgment and the sheriff's deed executed in pursuance of such sale, the plaintiffs acquired a title to the lands so sold, superior to the defendant's title derived from the receiver. The decree should direct that the defendant and his tenants, and any other person claiming under him, surrender to the plaintiffs the possession of the lands purchased by them at the sheriff's sale, except the lot conveyed to the defendant by William H. Seward and wife, on the 12th of January, 1842; that the defendant should be charged with the rents and profits of the property, since, by virtue of their sheriff's deed, the plaintiffs became entitled to the possession of it, and credited with the value of any permanent improvements made by him upon the property; and also the amount paid by him on account of any incumbrances upon the property prior to the plaintiffs' judgment; that it be referred to some suitable person to take an account upon these principles, and that the defendant pay to the plaintiffs any amount which may be

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found due upon such accounting. The defendant must also be charged with the costs of this litigation.

WATSON, J. concurred.

PARKER, J. dissented.

Decree accordingly.

CLINTON GENERAL TERM, July, 1849. *Paige, Willard, and Hand, Justices.*

6 607
181a 187
6b 607
23ap 87

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Parol evidence is inadmissible for the purpose of divesting the title of the owners of real estate. Accordingly, where a particular place, claimed to be a public highway, had never been opened, or worked, or used, as a highway, it was *held* that it could not be proved a highway, by parol.

The want of jurisdiction in tribunals of special and limited jurisdiction can always be shown.

If they do not acquire jurisdiction their proceedings are *coram non judice*, and void. The party claiming under the judgment or final determination of such tribunals is bound to prove, affirmatively, the facts necessary to give them jurisdiction.

The jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction.

No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alledging the existence of facts on which jurisdiction depends.

If the record of an inferior court or tribunal omits to state facts necessary to give it jurisdiction, such record, without proof of the facts *aliunde*, is not evidence, for any purpose.

To give commissioners of highways jurisdiction of proceedings to lay out a highway, an application must be made to them, in writing, by a person liable to be assessed for highway labor.

And an order directing the laying out of a highway, made by a county judge on appeal from a decision of such commissioners, must recite the making of such an application to the commissioners. Otherwise the order will not be conclusive evidence of the regularity of the proceedings for laying out the road. And unless the facts necessary to give the commissioners of highways jurisdiction are proved, *aliunde*, such order will not be evidence for any purpose.

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On an indictment for an assault and battery, the defendant may give evidence to show that he owned the premises on which the assault and battery were committed, and that he did the acts complained of, in defence of the possession of his said premises.

And if the assault and battery was committed in resisting persons entering upon the premises to open and work a highway, the defendant may prove that the alleged highway was laid through his orchard of four years' growth, without his consent.

ERROR from the court of general sessions of Washington county. This was an indictment for an assault and battery, committed upon one Martin Burch by the defendant below, while Burch was engaged in removing a fence. The question on the trial was, whether the place where the fence (attempted to be removed) was standing, and where the assault and battery was committed, was a public highway. The district attorney offered parol and documentary evidence to show that the place was in a public highway; which evidence was objected to by the defendant as inadmissible, but was received by the court. The jury convicted the defendant.

E. D. Culver, for the plaintiff in error.

C. F. Ingalls, (district attorney,) for the people.

By the Court, PAIGE, P. J. Burch was a witness on the trial, on behalf of the people. He was asked whether the place in question was a public highway. This question was objected to by the defendant, but the objection was overruled by the court. Burch testified that the place was a public highway. It is apparent from the evidence, that the public highway, or what was claimed to be one, had neither been opened or worked, or used as a public highway. The attempt therefore was, by parol evidence, to divest the title of the owners of real estate. I think the evidence was inadmissible.

The district attorney offered in evidence an order of John McLean, first judge of Washington county, laying out the highway in question, made on an appeal to him by Martin Burch from the decision of the commissioners of highways of the towns

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of Easton and Cambridge, refusing to lay out such highway. This order was objected to as evidence, on the grounds that it did not show that the preliminary steps had been taken to give jurisdiction to the judge; and that the proceedings were had on the appeal, before the expiration of sixty days from the filing of the decision of the commissioners of highways. The evidence was also objected to, on the ground that there had been no written application to the commissioners to lay out the road; and also on the grounds that the road laid out by Judge McLean was laid out through an orchard of more than four years' growth, and through fixtures and a cider mill, without the consent of the owner. And the defendant offered to prove the truth of the facts stated in his objections. All the objections were overruled, and the evidence was received. The district attorney also read in evidence the written decision of two judges of the county of Washington, associated with Judge McLean, made on an appeal to them by one Julius Phelps from the decision of Judge McLean; which decision of the three judges affirmed that of Judge McLean. The defendant offered to prove, by way of defence and justification, that he owned the premises where and on which the assault and battery were committed; and that he did the acts complained of in defense of the possession of his said premises; that the road was laid through the orchard of the defendant, of more than four years' growth, without his consent, and also through his cider mill and the yard necessary for the use and enjoyment thereof, without his consent; that twelve reputable freeholders did not examine and certify in regard to the necessity and propriety of the road, before it was laid out; and that the notices required by the 59th section of the title of the revised statutes relative to highways were not posted, as required by that section. The court overruled this defense, and decided that the order made by Judge McLean, and the order of affirmance of that decision, made by the two judges associated with him, were conclusive evidence of the regularity of the laying out of the road.

Judge McLean and the two judges associated with him on the appeal from his decision, constituted tribunals of special and

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limited jurisdiction. The want of jurisdiction in such tribunals can always be shown. If they do not acquire jurisdiction their proceedings are *coram non judice*, and utterly void. And the party claiming under the judgment or final determination of such tribunals, is bound to prove affirmatively, the facts necessary to give them jurisdiction. (*Striker v. Kelly*, 7 *Hill*, 24. 19 *John*. 34, 40. 2 *Hill*, 468, and note. 20 *Wend*. 241. 3 *Barb. Sup. C. Rep.* 341. 1 *Hill*, 139. 15 *John*. 141. 9 *Cowen*, 229. 5 *Wend*. 295. 11 *Id.* 641.)

If a court, whether of general or limited jurisdiction, undertakes to hold cognizance of a cause without having jurisdiction both of the person and the subject matter, the proceedings will be utterly void. And in the case of a limited or special jurisdiction, the magistrate or party attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such case becomes a trespasser. (19 *John*. 40, 41. 3 *Cow*. 209; 2 *Cow*. & *Hill's Notes*, 990.) The jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alledging the existence of facts on which jurisdiction depends. (5 *Hill*, 168, *per Bronson*, J. 5 *Wend*. 158. 6 *Id.* 452.(a) The statement or recital, in a record of an inferior court or tribunal, of facts constituting jurisdiction, may be received as *prima facie* evidence of such facts. (12 *Wend*. 102. *Jenks v. Stebbins*, 11 *John*. 226. 15 *Wend*. 372. 3 *Id.* 42.) But if the record of the inferior court or tribunal omits to state facts necessary to give it jurisdiction, such record, without proof of the facts *aliunde*, is not evidence for any purpose. (11 *Wend*. 647. 5 *Id.* 292. 2 *Cow*. & *Hill's Notes*, 1013. 8 *Cow*. 361, 370.) But it seems that the record of the judgment or conviction of an inferior court or tribunal which has jurisdiction over the subject matter, is, if no defects appear on the face of it, conclusive evidence of all facts stated in it, except such as are jurisdictional. (13 *John*. 184. 3 *Wend*. 42, 47. 16 *East*, 13, 20. *Strickland v. Ward*, 7 *Term Rep.* 630, note. 2 *Phil*.

(a) See also *Prosser v. Secor*, 5 *Barb. Sup. C. R.* 607.

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Ev. 415, *Cow. & H. ed.* *Basten v. Carew*, 3 *Barn. & Cress.* 649. *Brittain v. Kinnaird*, 1 *Brod. & Bing.* 432. *Mather v. Hood*, 8 *John.* 50. 8 *Cow.* 137.)

Every statute authority in derogation of the common law, to divest the title of one and transfer it to another, must be strictly pursued, or the title will not pass. The recitals in a conveyance given under such statute authority are not evidence of the regularity of the proceedings; and the fact that they were regular must be proved, and the *onus* rests on the purchaser. (4 *Hill*, 86. 2 *Barb. Sup. C. R.* 113. 3 *Id.* 275, 341, 360. 7 *Cowen*, 88.) The order of Judge McLean, made on the appeal to him, and the order of the two judges associated with him, affirming his decision, do not state the facts necessary to give the commissioners of highways jurisdiction of the application of Burch to lay out the highway in question. To give the commissioners jurisdiction an application should have been made to them, in writing, by a person liable to be assessed for highway labor. (1 *Rev. Stat.* 513, § 56.) This fact is not recited in the order of Judge McLean; and the defendant offered to prove that no such written application had been made to the commissioners. If the commissioners had no jurisdiction of the application to lay out the road, their determination was void; and the appeal from that determination, and the decision on the appeal, were also void. If no legal foundation was laid for the appeal, both appeals, and all the proceedings thereon, were nullities. The court below erred in deciding that the orders of Judge McLean, and of the three judges, were conclusive evidence of the regularity of the laying out of the road. These orders, as the district attorney did not prove the facts necessary to give the commissioners of highways jurisdiction, were not evidence, for any purpose. The district attorney ought to have been required, by the court, to prove the facts made necessary by the statute to give the commissioners jurisdiction; or at least the defendant should have been allowed to show their want of jurisdiction.

The court ought to have received the evidence offered by the

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defendant, that he owned the premises on which the assault and battery were committed, and that he did the acts complained of, in defence of the possession of his said premises. If the defendant was the owner, and in possession of, the premises, he had a right to defend his possession against the tortious entry of an intruder.

If the premises where the battery was committed was an orchard of four years growth, the highway could not have been laid through it without the consent of the defendant. And if the highway had been laid out through this orchard without the defendant's consent, the commissioners of highways, and their agents, would have been trespassers, in entering upon the premises to open and work such highway. (4 *Cow.* 190.) The evidence, therefore, offered by the defendant to show that the road was laid through his orchard without his consent, should have been received. The offer was not very specific, but it was undoubtedly intended as an offer to show that the identical premises where the battery was committed were an orchard, and the orchard referred to, through which the road was laid. If it had appeared that the premises where the battery was committed, belonged to, and were in the possession of the defendant, and that they were enclosed, improved, or cultivated, and that the road had been laid through them without the defendant's consent, it would undoubtedly have been necessary for the district attorney to have shown that the necessity of the road had been certified to by the oaths of twelve reputable freeholders, as required by the title of the statute relative to highways.

The mistake in the date of the order of Judge McLean, was a clerical mistake, and did not invalidate the order. The neglect of Judge McLean to suspend proceedings upon the appeal to him, until the expiration of 60 days from the determination of the commissioner of highways, as required by the 85th section of the statute, (1 *R. S.* 518,) if that section was not merely directory, was only erroneous, for which the remedy was by certiorari. It did not render his proceedings and decision void.

It is not necessary to notice any of the other questions raised on the argument.

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The judgment of the court below must be reversed, and an order entered for a new trial in the court of sessions of Washington county.

SAME TERM. *Before the same Justices.*

NOYES vs. BUTLER.

In an action upon a judgment of a court of a sister state, the jurisdiction of such court may be inquired into, although the record of the judgment states facts giving the court jurisdiction.

A record is never conclusive as to a recital or statement of jurisdictional facts. The defendant is always at liberty, when a suit is brought, here, on a judgment of a court of another state, to show a want of jurisdiction, notwithstanding the record avers the contrary.

No court can acquire jurisdiction by a false assertion of facts on which jurisdiction depends. *Per* PAIGE, P. J.

But the record of a judgment recovered in another state, which states facts giving the court jurisdiction, will be received here as *prima facie* evidence of such facts. The defendant, however, may contradict and disprove them.

Accordingly he may show that the court had not jurisdiction of the subject matter of the suit, or of his person, by the personal service of process, or by his appearance in the suit either in person or by attorney.

No statements, in a record, will conclude the parties as to any jurisdictional fact.

But where the record of a court of a sister state, on its face, shows that the court had jurisdiction of the subject matter of the suit, and of the person of the defendant, such record is conclusive as to every other fact contained in it.

Where such a record does not show that the court acquired jurisdiction of the person of the defendant, the plaintiff in an action in this state founded upon the judgment can not prove, by parol evidence, in aid of the record, that the court which rendered the judgment did obtain jurisdiction of the person of the defendant, either by personal service of process, or by his appearance in person or by attorney.

Although a party may offer evidence to explain, he can not introduce it for the purpose of adding to, or contradicting a record.

If the record of a judgment recovered in another state, alleges that at a specified term of the court the parties *appeared*, and that the action was continued until a subsequent term, when judgment was rendered in favor of the plaintiff, this is sufficient, *prima facie*, to show that such court acquired jurisdiction of the person of the defendant.

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THIS was an action of debt, brought upon a judgment rendered by the court of common pleas of Merrimack county, New Hampshire. The defendant pleaded that he did not reside in New Hampshire at the time, and was not served with process in the suit; had no notice thereof, and did not appear in the action, &c. The plaintiff replied that the defendant appeared, &c. The cause was tried at the Essex circuit, in October, 1848, by Justice PARKER, without a jury. The plaintiff introduced in evidence the exemplification of the record of a judgment recovered in the court of common pleas of Merrimack county, New Hampshire, by the plaintiff against the defendant. It appeared by the record, that the suit was commenced by attaching certain real estate of the defendant, and by leaving with the town clerk of the town of Henniker, a copy of the writ of attachment. The record stated that the cause was continued to the September term (1838) of said court, and that at said September term, *the parties appeared*, and the action was continued from term to term, to September, 1839; that at that term, the plaintiff appeared, but that the defendant made default; that the action was further continued from term to term until September, 1840, when judgment was rendered in favor of the plaintiff, for \$69.92 damages, and \$24.62 costs. The defendant objected to the record as evidence, on the ground that it did not appear that the court acquired jurisdiction of the person of the defendant, by his appearance in person or by attorney. The plaintiff thereupon proved by the testimony of H. Chase, of New Hampshire, taken under a commission, that Chase was an attorney at law in Concord, New Hampshire, and was employed by the defendant, to appear for him in the suit in which such judgment was rendered, and that he did so appear therein; that the defendant retained him generally to appear and answer the said action, and that he did appear therein and answer the action in the usual manner; that the defendant, when he employed the witness to appear in the suit, directed him to see that the property attached was properly applied to satisfy the plaintiff's claim, and did not claim to have any defense as to any balance which might be due the plaintiff after

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the application of the said property. The testimony of Chase was objected to by the defendant, on the ground that the appearance of the defendant in the suit in New Hampshire, could not be proved by parol. The defendant objected to the plaintiff's recovery, on the ground that the appearance of the defendant in the suit in New Hampshire, (if any had been proved) was only for the purpose of protecting the property attached; and also on the ground that it appeared from the record, that an execution had been issued on the judgment in New Hampshire, and that it had not been returned or accounted for. The justice overruled the objections, and directed a judgment to be entered for the plaintiff. The defendant excepted.

T. A. Osborne, for the defendant.

M. T. Clough, for the plaintiff.

By the Court, PAIGE, P. J. It has been repeatedly decided by the supreme court of this state, that a judgment of a court of a sister state is not conclusive upon the parties, and has no binding effect in this state, unless the court had jurisdiction both of the subject matter of the suit, and of the person of the defendant. The want of jurisdiction is a matter which may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes the judgment utterly void, and unavailable for any purpose. (*Borden v. Fitch*, 15 *John.* 140. 19 *Id.* 162, 164. 4 *Cowen*, 292. 5 *Wend.* 148. 6 *Id.* 447. 9 *Mass. Rep.* 467. 6 *Pick.* 232.)

The constitution of the United States, which declares that full faith and credit shall be given in each state to the judicial proceedings of every other state, and the act of congress of the 26th of May, 1790, which declares that the judgments of state courts shall have the same faith and credit in other states, as they have in the state where they are rendered, do not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered; nor an inquiry into the right of

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the state to exercise authority over the parties, or the subject matter; nor an inquiry whether the judgment is founded in, or impeachable for, fraud. (*Constitution of U. S. art. 4, § 1. Story's Const. of Laws, § 609. Taylor v. Bryden, 8 John. 173. Mills v. Duryee, 7 Cranch, 481. 19 John. 164. 15 Id. 140. 4 Cowen, 292.*)

The jurisdiction of the court of a sister state may be inquired into, although the record of the judgment states facts giving it jurisdiction. The record is never conclusive as to a recital or statement of jurisdictional facts, and the defendant is always at liberty, when a suit is brought in this state on a judgment of a court of a sister state, to show a want of jurisdiction, although the record avers the contrary. (5 *Wend.* 158. 6 *Id.* 452. 4 *Cowen*, 294.) No court can acquire jurisdiction by a false assertion of facts on which jurisdiction depends. (5 *Hill*, 168, *Bronson, J.*) But the record of a judgment of a court of a sister state, which states facts giving the court jurisdiction, will be received as *prima facie* evidence of such facts. (6 *Wend.* 452, 3. 5 *Id.* 148.) The defendant, however, is not estopped by such statement in the record from contradicting and disproving it. (*Id.*) The defendant is always at liberty to show that the court had not jurisdiction of the subject matter of the suit, or of his person, by the personal service of process, or by his appearance in the suit, either in person or by attorney. (6 *Id.* 447, 452, 3. 5 *Id.* 158.) Parker, Ch. J., in *Hall v. Williams*, (6 *Pick.* 239,) intimated an opinion that if it appeared by the record that the defendant had notice of the suit, or that he appeared in defense, he could not, under the constitution of the United States, and the act of congress, be allowed to contradict the record, by disproving the statement therein of notice of the suit, and of his appearance. But in this state it has been distinctly settled, by repeated adjudications, that no statements in the record can conclude the parties as to any jurisdictional fact. But where the record of a court of a sister state, on its face, shows that the court had jurisdiction of the subject matter of the suit and of the person of the defendant, and where such jurisdiction is not disproved, such record is, under the constitution

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of the United States, and the laws of Congress, conclusive evidence of every other fact contained in it. It ranks as high as a domestic judgment; and will be as conclusive as such a judgment, upon the parties. (9 *Mass. Rep.* 468. 6 *Wend.* 453. 6 *Pick.* 241.)

If the record of a judgment of a court of a sister state omits a statement of facts necessary to give the court jurisdiction of the person of the defendant, and it is sought to be enforced in this state by an action founded upon it, no credit can be given to such judgment, and it will be regarded as a nullity. (6 *Wend.* 450, 453. 9 *Mass. Rep.* 467. 5 *Wend.* 162. 6 *Pick.* 241, 245, 247. 13 *John.* 206, 207. *Kibbe v. Kibbe*, *Kirby*, 119. 5 *John.* 41.) The same principle seems applicable to a record of a judgment of a court of this state, where the record does not show that the court acquired jurisdiction of the person of the defendant. (11 *Wend.* 647, 653.)

Where the record of a judgment of a court of a sister state does not show that the court acquired jurisdiction of the person of the defendant, can the plaintiff in an action in this state, founded upon the judgment, prove, by parol evidence, in aid of the record, that the court which rendered the judgment did obtain jurisdiction of the person of the defendant, either by personal service of process, or by his appearance in person or by attorney? I think he can not. It is not competent either to contradict, or to add to a record. Although a party may offer evidence to explain, he can not to add to, or contradict, a record. (2 *Cowen & Hill's Notes*, 839, 799. 2 *John.* 24. 1 *Phil. Ev.* 317.) A party may show that the instrument produced is not in truth a record. Thus the defendant may show that it is a forgery; or he may show a want of jurisdiction in the court pronouncing the judgment. If the court had not jurisdiction, the paper introduced is, as to the defendant, no record. (5 *Wend.* 158.) The principle which forbids the contradiction of a record, has no application to a case where the question is whether there is or is not a record. The question is an altogether different one where a plaintiff, suing upon a judgment, as a valid and binding judgment, introduces in evidence the re-

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cord of the judgment, and then offers parol evidence to supply a material omission in the record; in other words, offers parol evidence to add to the record. A record can only be proved by the original on file, or an exemplification in due form of law, or a sworn copy. Its contents can not be proved by parol. (1 *Phil. Ev.* 316, 317, 386.)

If it was merely a deed or other written instrument, parol evidence would be inadmissible to contradict, add to, or vary it. (*Id.* 547.) I think, therefore, that the testimony of Chase and others, under a commission, introduced in evidence, on the trial of this cause, by the plaintiff, was incompetent evidence. If the record does not show that the court in New Hampshire acquired jurisdiction of the person of the defendant, it was not competent for the plaintiff to supply this omission by parol evidence.

I think, upon the authority of *Shumway v. Stillman*, (6 *Wend.* 447,) that the record in this case sufficiently shows that the court in New Hampshire acquired jurisdiction of the person of the defendant. The record states that at the September term (1838) of the court the parties appeared, and that the action was afterwards continued from term to term until the September term of 1840, when judgment was rendered in favor of the plaintiff. In *Shumway v. Stillman*, the record stated that the defendant, by E. Hinds, his attorney, appeared and pleaded the general issue. It also showed that the suit was commenced by attachment; that bank notes to the value of \$75,26 and a quantity of machine irons of the value of one dollar, both the property of the defendant, were attached by the sheriff; that the defendant was not found in the bailiwick of the sheriff, and that he summoned E. Hinds, Esq. the attorney of the defendant, by giving him a copy of the writ. *Savage*, Ch. J. (p. 452,) says: "By the record it appears that the defendant was not personally served with process, and that an attachment was served upon bank bills, as the property of the defendant. But this does not disprove the fact that he appeared by his attorney, E. Hinds: this fact appears from the record. Although the defendant was not served with process, still he may have authori-

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zed an attorney to appear for him and litigate the plaintiff's claim against him." Chief Justice Savage, in that case also said, (p. 453,) that the record was prima facie evidence of the fact of the appearance of the defendant by his attorney, and, being uncontradicted, was conclusive. The present case is substantially the case of *Shumway v. Stillman*. Here it appears that the suit was commenced by attaching real estate of the defendant, and by leaving a copy of the writ of attachment with the town clerk. But the record states that subsequently, at the September term of 1838, the parties appeared in the suit. By this statement we must intend that both parties appeared; and that the defendant appeared either in person, or by attorney. If the defendant did so appear, the court acquired jurisdiction of his person, and the record of the judgment is conclusive evidence of his indebtedness, and it can neither be impeached nor contradicted by him. In *Shumway v. Stillman*, (4 Cowen, 296,) Sutherland, J. says, "every presumption is in favor of the jurisdiction of the court. The record is prima facie evidence of it, and will be held conclusive, until clearly and explicitly disproved." He says "the defendant, although a resident of the state of New-York, may have been personally served with process in Massachusetts, may have entered special bail in the action, and may have appeared and litigated the cause, either in person or by attorney, upon the trial." In *Starbuck v. Murray*, (5 Wend. 159,) Marcy, J. says, "Although the defendant was not in the state, he might have authorized the entry of his appearance. He might have appeared by an attorney and fully contested the right of the plaintiff to recover. If he authorized his appearance, or if he retained an attorney to appear and defend the suit, his person would, by either of these acts, be submitted to the jurisdiction of the court." And at page 160, he says, "if the property of the defendant was attached to compel him to appear and answer the proceedings *in personam*, and he did, in fact, appear and litigate the cause with the plaintiff, he could not be heard to question the jurisdiction of the court over his person. In *Mayhew v. Thatcher*, (6 Wheat. 129,) decided in 1821, where the declaration was on a judgment rendered in

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Massachusetts, the original suit was commenced by a process of foreign attachment ; but the defendant subsequently appeared and made a defence : Marshall, C. J. says, " Although the original suit was commenced by an attachment, yet as the defendant had personal notice of the suit and afterwards appeared and took defense, even supposing there was any objection to the proceeding by attachment, it was cured by the appearance of the defendant and his litigating the suit." In that suit it was held that *nil debet* was not a good plea to the declaration.

I am aware that in *Pawlins v. Bird's Ex'rs*, (13 John. 206,) Platt, J. says, if the defendants in a suit commenced against them as absent and absconding debtors, by attachment, should subsequently actually appear and defend the suit, such appearance and defense must be deemed to have been merely to protect the pledge which was the legitimate object of the proceeding. The same opinion was very distinctly expressed by Parsons, C. J. in *Bissell v. Briggs*, (9 Mass. Rep. 468.) He says, " if the defendant, after the service of the process of foreign attachment, should, either in person have gone into the state of New Hampshire, or constituted an attorney to defend the suit, so as to protect his goods, effects, or credits from the effect of the attachment, he would not thereby have given the court jurisdiction of his person ; since this jurisdiction must result from the service of the foreign attachment." I confess that I am inclined to concur in the opinion of Chief Justice Parsons, and to hold, in accordance with his opinion, that the appearance of the defendant in this case, in the original suit, should be deemed an appearance merely to protect the property attached ; and that he did not, by such appearance, give the court of common pleas in New Hampshire jurisdiction of his person. But I consider myself bound by the decisions in *Starbuck v. Murray*, *Shumway v. Stillman*, and in *Mayhew v. Thatcher* ; and I must therefore hold that the appearance of the defendant in this case, in the original suit, gave the court jurisdiction of his person.

The objection to the recovery, that the execution issued on the original judgment in New Hampshire had not been returned, or accounted for, is not tenable. The same objection was made

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in *Shumway v Stillman*, (6 *Wend.* 453,) and overruled. The error of the judge, in receiving parol evidence of the appearance of the defendant, in the original suit, by Chase as his attorney, did not prejudice the defendant. The trial was by the court, and the record was sufficient proof of the defendant's appearance in the original suit, without the aid of such parol evidence.

The motion for a new trial must be denied.

SAME TERM. *Before the same Justices.*

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The docket of a justice of the peace, or a transcript from such docket, of the proceedings in a suit in which the justice acquired jurisdiction of the cause, and of the person of the defendant, is conclusive evidence of the facts therein stated; and in a suit upon the judgment rendered by the justice, can not be contradicted by parol evidence.

Where an inferior court has once acquired jurisdiction, it will not lose it by a subsequent error or irregularity. Accordingly *held*, that a justice of the peace did not lose jurisdiction of a cause by erroneously adjourning it, contrary to the agreement of the parties, and that a judgment subsequently rendered by the justice was valid until reversed on certiorari.

THIS case came up by appeal from the county court of the county of Franklin. The suit was originally commenced before a justice. Hard, the plaintiff, declared against Shipman, the defendant, in debt, on a judgment rendered July 26th, 1847, before one Henry E. Button, a justice of the peace, in favor of Hard against Shipman, for \$25.47, damages and costs. Shipman pleaded *nil debet*. On the trial before the county judge, the plaintiff introduced in evidence a transcript, from the docket of Button, of the judgment, and proceedings had before him; together with the certificate of the county clerk required by the revised statutes. The transcript set forth the proceedings in the suit before Button; and, among other things, stated that the

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cause was adjourned until the 19th day of July, 1847 ; at which time and place the cause was called, and the parties appeared, and such proceedings were had in the said cause, that the same was adjourned by the agreement of the parties until the 26th day of July, then instant ; at which time the cause was called, and the plaintiff appeared, but the defendant did not appear ; and that, after waiting one hour, and the defendant not appearing, the plaintiff thereupon duly proceeded to the trial of the cause, &c. The defendant then offered to prove, by parol testimony, that the cause mentioned in the transcript was not adjourned by the agreement of the parties from the 19th to the 26th of July, 1847, but that the parties had agreed to adjourn the cause to the 22d day of July. To which evidence the plaintiff objected. But the judge received the evidence, and the plaintiff excepted. The defendant proved that the cause was tried by a jury on the 19th day of July, 1847 ; that the jury did not agree, and were discharged by the justice ; that while the jury were out deliberating on their verdict, an agreement was made between the plaintiff and defendant, and the justice, on the outer steps of the house where the trial was had, that if the jury did not agree, the cause should be adjourned until the 22d day of July, then instant, and a new venire issued, returnable on that day ; that the defendant then left the court, and was not present when the jury came in.

The plaintiff offered to prove that after the 19th of July, and prior to the 26th, the defendant had notice that the cause was adjourned to the 26th of July, as stated in the transcript, and that the defendant thereupon consented to such adjournment to the 26th. The defendant objected to this evidence, and the county judge sustained the objection, and rejected the evidence ; and the plaintiff excepted. The judge charged the jury that the parol evidence introduced on the part of the defendant to contradict the transcript of the justice, as to the adjournment of the cause, by the consent of the parties, to the 26th of July, was competent evidence, as it related to the jurisdiction of the justice ; and that if the jury believed, from the evidence, that the cause was not adjourned by the consent of the parties to the

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26th of July, they should find a verdict in favor of the defendant. To this charge the plaintiff excepted. The jury found a verdict for the defendant.

John Hutton, for the appellant.

Wm. A. Wheeler, for the respondent.

By the Court, PAIGE, P. J. The only question in this case is, whether the evidence received by the county judge, to contradict the transcript from the docket of Button, of the judgment and proceedings before him in the prior suit between the parties to this suit, was competent evidence. If the transcript was conclusive evidence of the fact stated therein, of the adjournment of the cause, by the consent of the parties, to the 26th of July, 1847, then the evidence received in contradiction of the statement of that fact in the transcript, was inadmissible.

The want of jurisdiction may always be set up against a judgment of a court, whether of general, or of special and limited jurisdiction, whenever such judgment is sought to be enforced, or any benefit is claimed under it. To give any binding effect to a judgment, it is essential that the court should have jurisdiction both of the person, and of the subject matter. There is, however, a marked distinction between superior courts of general jurisdiction, and inferior courts, or courts of special and limited jurisdiction. As to the former, the intendment of law is that they had jurisdiction, until the contrary appears; but as to the latter, those who claim any right or exemption under their proceedings, are bound to show affirmatively, that they had jurisdiction. (*Mills v. Martin*, 19 *John*. 33, 4, *Spencer, C. J. Borden v. Fitch*, 15 *Id.* 141, *Thompson, Ch. J.* 9 *Cowen*, 229. 19 *John*. 40. *Jackson v. Slater*, 5 *Wend.* 295. 11 *Id.* 647. 3 *Cowen*, 208.) In pleading the proceedings of an inferior court, it is necessary to state sufficient to give jurisdiction to the court, and on the trial, the party setting up such proceedings must prove the facts giving the court jurisdiction. (6 *Cowen*, 236. 7 *Hill*, 24. *Frary v. Dakin*, 7 *John*. 78, 9.) If a court, whether of general or limited jurisdiction, undertakes to hold cognizance

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of a cause, without having jurisdiction both of the person and subject matter, the proceedings are utterly void: and, in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction in such a case, becomes a trespasser. (19 *John*. 40, 41. 3 *Cowen*, 209.) But if an inferior court acquires jurisdiction, but errs in exercising it, the proceedings of the court are not void, but voidable only. They will protect the magistrate, parties, and officer. They may be reversed on certiorari or appeal, but are valid and binding until reversed; and can not be collaterally assailed. It is a well settled principle, where an inferior court has acquired jurisdiction, that its proceedings will not be rendered void by any subsequent error, or irregularity of the court. In such case, they are reversible, but until reversed they are valid in respect to every body. (2 *Cowen & Hill's Notes*, 978, 989. 8 *Cowen*, 178, 187.) Where jurisdiction has been once gained, it can not be lost by a subsequent irregularity; and every intendment will be made in favor of the regularity of the subsequent proceedings. (3 *Denio*, 168. 8 *Cowen*, 137, 187. 2 *Cowen & Hill's Notes*, 1014. 10 *Pet.* 449.) The jurisdiction of a court, whether of general or of limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. The record is never conclusive as to a recital, or the statement of a jurisdictional fact; and the defendant is always at liberty to show a want of jurisdiction, although the record avers the contrary. No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alledging the existence of facts on which jurisdiction depends. (5 *Hill*, 168, *per Bronson, J.*)(a) If the court had no jurisdiction, it had no power to make a record; and the supposed record is not in truth a record. If not a record, it can not import absolute verity. (*Starbuck v. Murray*, 5 *Wend.* 158. *Shumway v. Stillman*, 6 *Id.* 452. 5 *Hill*, 168.)

But the record of a court of general jurisdiction, of either this or any other state in the Union, if it state facts giving the court jurisdiction, is *prima facie* evidence to prove the jurisdiction of

(a) See also *Noyes v. Butler*, (*ante*, p. 613.)

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the court. (6 *Wend.* 447.) And such record, when the jurisdiction of the court is established, is conclusive upon the parties thereto and their privies, as to every fact stated in it, except such as are jurisdictional. (2 *Cowen & Hill's Notes*, 1014.) In England it seems to be unsettled whether the statement of jurisdictional facts in records of courts of limited and special jurisdiction, can be received as *prima facie* evidence of such facts. Phillipps intimates that such statements are evidence of jurisdiction. (2 *Phil. Ev.* 416.) The contrary opinion is expressed in several cases in the English courts. (2 *Cowen & Hill's Notes*, 1014, 1015.) Parties claiming under a judgment of a court of inferior jurisdiction, must show affirmatively that such court had jurisdiction. In this state it appears to have been settled that the statement or recital in a record of an inferior court or tribunal, of facts constituting jurisdiction, may be received as *prima facie* evidence, and that proof of such facts *aliunde*, where the record contains a statement of them, is not necessary. This was expressly held in *Barber v. Winslow*, (12 *Wend.* 102.) And this decision was authorized by the previous decisions in *Jencks v. Stebbins*, (11 *John.* 226;) 16 *East*, 13; 15 *Wend.* 372, and 3 *Id.* 42. Although the question in *Barber v. Winslow* arose on a discharge under the insolvent act of the 12th of April, 1813, (1 *R. L.* 464,) the 8th section of which declared that the discharge should be conclusive evidence of the facts therein contained, the decision in that case was not founded on that section. That section did not dispense with the necessity of showing jurisdiction in the discharging officer, or preclude a party from showing the want of jurisdiction in the first instance. (3 *Denio*, 170. 9 *Wend.* 465. 4 *Hill*, 598.)

If the record of the inferior court omits to state facts necessary to give the court jurisdiction, it is not, without proof of such facts *aliunde*, evidence for any purpose. (11 *Wend.* 647. 5 *Id.* 292. 2 *Cowen & Hill's Notes*, 1013. 8 *Cowen*, 361, 370.) The same rule is applicable to records of judgments of the courts of a sister state, whether of general or limited jurisdiction. (6 *Wend.* 447.)

Is the docket of a justice of the peace, or a transcript from such docket, in a suit in which the justice acquired jurisdiction of the

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cause, and of the person of the defendant, conclusive evidence of the facts therein stated ?

A record of a court of record imports absolute verity, and can not be contradicted. It is conclusive proof that the decision or judgment of the court was as is there stated. (1 *Phil. Ev.* 317.) In *Possion v. Brown*, (11 *John.* 166,) it was held that although the proceedings and judgment before a justice of the peace, might not be technically a record, yet parol evidence of them was not admissible, and that the written minutes or evidence of the proceedings must be produced ; and that the statute (1 *R. L.* 398, § 21) directing the manner in which proceedings before justices of the peace should be authenticated, seemed to regard such proceedings as in the nature of a record. In *Pease v. Howard*, (14 *John.* 479,) it was held that an action of debt upon a judgment in a justice's court, was not barred by the statute of limitations ; because, as the judgment was conclusive evidence of the debt, it was a debt by specialty. Van Ness, J. in that case, says, "Whether a justice's court is strictly a court of record it is not material to determine in this case ; for if it be not, it is settled that a judgment rendered in it is conclusive evidence of a debt, and the merits of such a judgment, while it remains in force, can not be overhauled or controverted in an original suit at law, or in equity ; and it is as final, as to the subject matter of it, to all intents and purposes, as a judgment of this court." In *James v. Henry*, (16 *John.* 233,) it was held that a justice's judgment was equivalent, at least, to a specialty ; and that assumpsit would not lie on such a judgment. In *Mitchell v. Hawley*, (4 *Denio*, 416,) Beardsley, J. says, the judgment of a justice, in a case in which he has jurisdiction, is "in the nature of a debt of record ;" it "is more than equivalent to a specialty ; for that may be impeached on various grounds, as fraud or illegality. Such a judgment, however, while unreversed, is, for every purpose, as conclusive, between the parties, as that of the highest court of record in the state." Since the adoption of the revised statutes, a justice's court has higher claims to the rank of a court of record, and the docket of a judgment therein to the dignity of a record, than before that

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time. The revised statutes (2 R. S. 268, § 243) require every justice of the peace to keep a book, and to enter therein particularly every material proceeding in the cause. These requirements were new, and not contained in the old justices' acts. If a justice's judgment is now entitled to rank as a record, the rule of evidence applicable to records must be applied to it. If it is more than a specialty, and is as conclusive between the parties as the judgment of the highest court of record, I can not see why it is not entitled to take its rank as a record. If it is to be deemed a record, it follows that it can not be contradicted by parol evidence. Even as a specialty, to which at least it is equivalent, parol evidence is not admissible to contradict it. (1 *Phil. Ev.* 548, 555.)

Section 246 (2 R. S. 267) declares that the transcript from the docket of a justice, of a judgment before him, shall be evidence to prove the facts stated in such transcript. Section 21 of the justices' act of 1813, (1 R. L. p. 398,) declared that the official certificate of a justice of the peace, of the proceedings and judgment in a suit before him, should be good and legal evidence to prove the facts contained therein, and nothing more. In *McLean v. Hugarin*, (13 *John.* 184,) it was held that parol evidence was not admissible to contradict a certificate of a justice of the proceedings in a former suit before him, given under the 21st section of the justices' act of 1813. In *Bates v. Conckling* (10 *Wend.* 389,) where a justice's return, on appeal, stated that four persons were impleaded as defendants, and joined issue in the cause, it was held that evidence on the trial in the common pleas, was inadmissible to show that only two of the defendants were arrested and brought into court. In *Van Steenbergh v. Bigelow*, (3 *Wend.* 42, 47,) it was decided that the inquisition made by appraisers under the "act relative to turnpike companies," (1 R. L. 230, § 3,) was conclusive as to the facts stated in it relative to their own proceedings. *Savage, C. J.* in that case says, (3 *Wend.* 48,) "By the inquisition the proceedings appear to have been regular; but if they were not, so long as a valid appraisement appears, we will not inquire collaterally into the proceedings of the appraisers. Enough is

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shown to give them jurisdiction. The inquisition is on file, and a matter of record. If incorrect, it might have been set aside on certiorari." In *Gray v. Cookson*, (16 *East*, 13, 20,) Lord Ellenborough intimated an opinion that a conviction, by magistrates, of an apprentice, under the act of 20 Geo. 2, ch. 19, § 4, good upon its face, could not be questioned collaterally in an action of trespass against the magistrates. In the case of *Strickland v. Ward*, (7 *T. R.* 629, 630, *note*,) which was an action of trespass and false imprisonment against the defendant, a justice of the peace, Mr. Justice Yates gave his opinion that a conviction, regularly drawn up, of the plaintiff by the defendant for unlawfully returning to a parish from whence he had been removed, "could not be controverted in evidence; that the justice having a competent jurisdiction of the matter, his judgment was conclusive, till reversed or quashed; and that it could not be set aside at nisi prius." Phillipps (2 *Phil.* 415) says, "It is a general principle of law, that where justices of the peace have an authority given to them by act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them in consequence of their having so acted."

In *Basten v. Carew*, (3 *Barn. & Cress.* 649,) such a conviction was held conclusive as an answer to an action of trespass against the magistrates. In *Brittain v. Kinnaird*, (1 *Brod. & Bing.* 432,) the court of common pleas of England decided that the conviction was conclusive evidence of the facts contained in it. In that case, Dallas, C. J. says, "It is established by all the ancient, and required by all the modern decisions, that a conviction by a magistrate who has jurisdiction over the subject matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it." The same proposition was advanced in that case by Justices Park, Burrough and Richardson. In *Mather v. Hood*, (8 *John.* 50,) it was held that a record of conviction by a justice, under the act to prevent forcible entries and detainers, which showed the justice had juris-

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diction, and proceeded regularly, was conclusive and could not be questioned or traversed in a collateral action. In *Cunningham v. Bucklin*, (8 Cowen, 187,) where a commissioner had acquired jurisdiction of an application for an insolvent's discharge, it was decided by the supreme court, that the discharge, while unreversed, was conclusive evidence of the facts stated therein, and could not be controverted.

The foregoing authorities, it would seem, clearly establish the proposition that the transcript from the docket of a justice of the peace, of a judgment rendered by him, was conclusive evidence of all but jurisdictional facts stated therein. But it is insisted that the evidence received by the county judge in this cause related to the jurisdiction of the justice, and was therefore competent evidence.

This proposition I think cannot be maintained. It is conceded that the justice, Button, acquired jurisdiction of the cause and of the person of the defendant. Having acquired jurisdiction, he did not lose it by erroneously adjourning the cause to the 26th instead of the 22d of July, contrary to the agreement of the parties.

This error, or irregularity, did not render the subsequent proceedings void. The judgment subsequently rendered was a valid judgment until reversed on certiorari. Where an inferior court has acquired jurisdiction it can not lose it by a subsequent error or irregularity. The defendant offered to prove, and proved, that the parties, while the jury were deliberating on their verdict, made an agreement for the adjournment of the cause to the 22d day of July. The defendant neither offered to prove, nor proved, that the justice did not, in fact, adjourn the cause, after the jury came in, to the 26th of July. We must assume, therefore, that the justice did actually, after the jury were discharged in open court, adjourn the cause to the 26th. This assumption is sustained by the offer of the plaintiff to prove that after the 19th of July, and before the 26th, the defendant had notice that the cause was adjourned to the 26th of July; and that the defendant consented thereto. Conceding the fact to be as proved by the defendant, the result is that the

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justice, after the jury were discharged, and while the court was open, adjourned the cause to the 26th of July, without the consent of the defendant. This was undoubtedly an error in the justice. If the agreement proved by the defendant, was made in court, and therefore a valid agreement, the justice should either have adjourned the cause to the 22d of July, or should, as soon as the jury were discharged, have issued a new venire returnable within forty-eight hours. (2 R. S. 245, § 111.) The justice's adjournment of the cause to the 26th of July, under the circumstances, amounted, to use the language of the cases, to a discontinuance of the suit. (*Gamage v. Law*, 2 John. 192. *Proudfit v. Henman*, 8 Id. 391. 5 Id. 353. 4 Id. 117. 9 Id. 140. 10 Wend. 497.) But according to the decision in *Horton v. Auchmoody*, (7 Wend. 200,) the justice did not, by such adjournment, lose his jurisdiction of the cause. He had jurisdiction of the cause, of the parties, and of the question of adjournment. His error was an error of judgment; a judicial error; and the only consequence of the error was, that the judgment entered after the adjournment, was reversable on certiorari. Although it is said, in the cases, that an adjournment of a cause by a justice, at his own instance, or at the instance of the plaintiff, without authority, amounts to a discontinuance of the suit; yet, by this expression, nothing more is meant than an irregularity or error, for which the judgment subsequently entered could be avoided or reversed on certiorari. The judgment is valid and binding until reversed. The remedy applied in all the cases above cited, bearing on this question, was the direct remedy by certiorari. In the case of *Hubbard v. Spencer*, (15 John. 244,) cited by the respondent's counsel, the cause was wholly out of court when the judgment was confessed. On the adjourned day neither of the parties appeared, and the justice did not retain his jurisdiction of the cause by an adjournment. More than a month after the cause was out of court, one Sherrill appeared before the justice and confessed a judgment in behalf of the defendant, and in favor of the plaintiff. This was a new suit, in which the justice never acquired jurisdiction of the person of the defendant. The supreme court,

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therefore, correctly decided that the proceeding was *coram non judice* and utterly void. In the case of *Cunningham v. Bucklin*, (8 Cowen, 178,) the insolvent's discharge recited a regular adjournment of the hearing to the day of the discharge. The plaintiff alleged that this recital was false, and that the commissioner had, previous to this alleged adjournment, dismissed the proceedings. Yet the court held that the discharge was conclusive evidence, and that the facts therein stated could not be controverted. If the question of the adjournment of the hearing related to the jurisdiction of the commissioner, the court could not have so decided. For the statute which declared that the discharge should be conclusive evidence of the facts therein contained, did not preclude an inquiry into the jurisdiction of the commissioner. (9 Wend. 469. 4 Hill, 598. 3 Denio, 170. 15 Wend. 372.) The court undoubtedly deemed the adjournment after the commissioner had declared that the proceedings were dismissed, an irregularity, for which the only remedy was a certiorari. (8 Cowen, 187.)

Even in some cases where a jurisdictional question is involved, the judgment of an inferior court is held to conclude the parties. Such cases are where the inferior court is authorized to ascertain and try a jurisdictional fact, and which fact is tried and determined judicially by the court. In these cases the decision can not be questioned collaterally, but can only be reviewed on a writ of error, or certiorari. (2 Cowen & Hill's Notes, 1016, 1020, 1. 1 Brod. & Bing. 432. 12 Pick. 572, 582, 3.)

I am satisfied that the evidence received by the county judge did not relate to the jurisdiction of the justice, and that it was therefore, for the reasons herein before stated, incompetent evidence to contradict the transcript from the docket of the former judgment. The remedy of a party who is injured by a false entry of a justice on his docket, or by a false transcript made by him, is by an action against the justice. (8 Cowen, 187.)

The judgment of the county court must be reversed ; and a new trial ordered in that court.

JEFFERSON GENERAL TERM, July, 1849. *C. Gray, Pratt, Gridley, and Allen*, Justices.

WIGGINS *vs.* HATHAWAY.

A postmaster is not liable for the malfeasance or embezzlement of his clerks or deputies; and it *seems* that he is not liable even for their negligence.

He is a public officer, or agent of the government; and as such, the rule of *respondet superior* does not apply to him.

A postmaster is only held to ordinary diligence in the discharge of the duties of his office. He can only be made liable for losses occasioned by a want of such diligence. And the burden of proof is upon him who alleges negligence, to establish the fact.

He must also show that the loss was the direct consequence of the particular negligence proved.

A postmaster is not liable for the contents of a lost letter, unless he has been guilty of negligence, and the loss was the consequence of such negligence.

MOTION to set aside a nonsuit and for a new trial. The action was brought against the defendant, who was postmaster at Rome, to recover \$100 alleged to have been lost, and which belonged to the plaintiff. The first three counts of the declaration charged that the defendant was such postmaster, and that \$100 was sent from Lafayette, in Pennsylvania, by mail, in a letter to the plaintiff, addressed to him at Rome; that the same came to the hands of the defendant as such postmaster; that he refused to deliver it; and that "he so carelessly and negligently conducted himself in the premises that through and by his carelessness and negligence the said letter and contents were lost to the plaintiff." The fourth count was in trover for the said \$100. On the trial the proof showed that the money was mailed at Lafayette in a letter directed to the plaintiff at Rome, on the 26th January, 1848, and that on the 2d of February the *post-bill* arrived at Rome and was entered and filed; but no evidence was given respecting the letter, subsequent to its being mailed at Lafayette. The plaintiff attempted to show negligence on the part of the defendant, and when the testimony on the part of the plaintiff was closed the court granted a nonsuit, which the plaintiff, upon a case, moved to set aside.

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W. Barnes, for the plaintiff. I. The count in trover is supported by the evidence. It appears, 1. That the letter was in the defendant's possession. 2. That the plaintiff demanded it, and offered to pay the postage; and 3. That it was not delivered. (1.) A refusal, on demand, is evidence of conversion. (*Cowen's Tr. 2d ed.* 302, citing 7 *John.* 254, 257. 9 *Wend.* 167. 10 *Id.* 389. 8 *Pick.* 543, &c.) (2.) The demand and refusal being only *prima facie* evidence, the defendant may repel it by giving evidence that there was no conversion. No such evidence was attempted to be given in this case, although the *onus* rested on him. (*Cowen's Tr.* 303, citing 1 *Cowen*, 322.) (3.) If the defendant has delivered the letter to a wrong person, it is a conversion. (*Cowen's Tr.* 303, 4, citing 1 *Cowen*, 322.)

II. The counts for negligence were supported by the evidence, and the evidence should have been submitted to the jury. Issue was joined upon the question of negligence—a fact to be inferred from the circumstances proved. If the evidence was proper for the consideration of a jury, the judgment of nonsuit (in a justice's court) will be reversed. (*Clements v. Benjamin*, 12 *John.* 299.) The motion for a nonsuit is equivalent to a demurrer to evidence. (5 *John.* 29.) The court will be extremely liberal in drawing their inferences. (1 *Doug.* 119. 2 *H. B.* 208. 4 *Cranch*, 219. 1 *John.* 241. *Patrick v. Hallet*, 2 *Caines' Cas. Err.* *Smith v. Stienback*, 2 *Conn. Rep.* 92. 4 *Cranch*, 219.) The testimony is to be taken most strongly against him who demurs. (1.) The postmaster is liable for his own negligence and delinquency. (*Story on Bail.* 300, 302, and authorities there cited. 2 *Kent's Com.* 610. 7 *Cranch*, 242. *Maxwell v. McIlroy*, 2 *Bibb*, 211.) (2.) A postmaster is liable for the acts of one in his office who is *not sworn*. (*Bishop v. Williamson*, 2 *Fairf.* 495) (3.) A postmaster is liable for money contained in a letter *deposited in his office*, which is purloined before it reaches its destination. (*Bolan v. Williamson*, 1 *Brev.* 181.) (4.) Although it may not have been decided that a postmaster is liable for the negligence of his clerks and servants, we insist that he is liable *upon principle*. (1 *Story on Bail.* 302.) 1. He is an executive officer, and may act by

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deputy. 2. The public good requires him to be responsible for their ability and fidelity. 3. He may exact bonds from them. 4. This would be no hardship upon the postmaster; for he would be indemnified for any loss occasioned by their delinquency. 5. Such agents are generally irresponsible persons, over whom no one but the principal has any control, not even the postmaster general. 6. The system (although a monopoly) has a benign influence upon the whole community; and it is important to the system as well as to individuals, that postmasters should be held for the acts of their agents.

H. A. Foster, for the defendant. I. The decision of the circuit judge, nonsuited the plaintiff, was correct. (1.) There was no evidence that the letter containing the money ever reached the post office at Rome. The receipt of the post-bill, at the post office in Rome, is not evidence that the letter arrived there. (2 *Cowen & Hill's Notes*, p. 1204. 2 *U. S. Cond. Rep.* 484.) (2.) But if it had been proved that the letter reached the Rome post office, the defendant could not be made liable without showing that the money was lost through the actual negligence of the postmaster himself. (*Dunlap v. Monroe*, 2 *Cond. Rep. of U. S.* 484.) It is well settled law that a postmaster is not liable for money stolen from letters in his office, whether it be stolen by strangers or by his assistants. (2 *Kent's Com.* 5th ed. 610. *Law v. Colton*, 1 *Ld. Raym.* 646. *Whitfield v. Lord Le Despeucier*, *Cowp.* 754.) So in *Schroyer v. Lynch*, (8 *Watts' Rep.* 453,) it was decided that a postmaster is not liable for the secret delinquencies of his agents; and that an action will not lie against him for the purloining of a letter, by his assistant, appointed and retained in good faith. (See also *Dun. Pay. on Agency*, 300, and notes (o.) and (p.); *Supervisors of Albany v. Dorr*, 25 *Wend.* 440, 442; *Morton v. Mayor of Brooklyn*, 1 *Hill*, 551.) (3.) Even if the letter and money had been lost by the negligence of the defendant's assistants, the plaintiff could not recover under the pleadings in this cause. "Where it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to

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the case: and his liability *then* will only result from his own neglect in not properly superintending the discharge of their duties in his office." (*Dunlap v. Monroe*, 2 Cond. Rep. 484.) When the issue is taken upon the neglect of the postmaster, it is not competent to give in evidence the neglect of his assistant. (*Dunlap v. Monroe*, *supra*. 1 John. 396.)

II. It is clear from the case that the plaintiff was not entitled to a verdict, upon the evidence; and as no injustice has been done him the court will not grant a new trial.

By the Court, PRATT, J. Conceding that the evidence was sufficient to authorize the jury to find that the letter actually arrived at the post office in Rome, yet it was, in our opinion, utterly insufficient to sustain the action of the plaintiff.

First. The defendant is clearly not liable for the malfeasance or embezzlement of his clerks or deputies; and it seems to be the better opinion, also, that a postmaster is not liable even for their negligence. He is a public officer or agent of the government, and as such the rule of *respondeat superior* does not apply to him. He is allowed and required to appoint sub-agents, who become, by such appointment, also agents of the government; and in this respect the liability of the superior does not vary essentially from the case where private agents employ sub-agents at the request of their principal. (*Story on Agency*, §§ 319, 320, 321, 313. *Dunlop v. Monroe*, 2 U. S. Cond. Rep. 461, 2, 3. 2 *Kent's Com.* 610. 3 *Wilson*, 443. 5 *Burr.* 2709. 4 *Mass. Rep.* 378. *Cowper*, 754, 765.)

The rule that makes the principal liable for the acts of his agent is based upon principles of public policy and convenience, but it is far from being a doctrine of universal application. (*See Coon v. The Syracuse and Utica Railroad Co.*, *ante*, p. 231. *Law v Cotton*, 1 *Ld Raym.* 646.) In order therefore to charge the defendant, the loss must have been occasioned by his own act. If it resulted from the malfeasance or negligence of his sub-deputies he is not liable; at least unless it can be proved that such deputies are notoriously unfit for the station, and thus charge the defendant with negligence in making the appoint-

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ment. (*Story on Agency*, 319. *Story on Bailm.* 462, 463. 2 *Kent's Com.* 610.) No such proof was offered in this case; nor was there any proof of negligence on the part of the defendant himself, in the general conduct of the office, unless it be negligent in him to keep his office in a room some parts of which were devoted to other kinds of business. That fact alone could scarcely be considered as sufficient to subject him to the charge of negligence.

Secondly. Even if the postmaster should be deemed responsible for losses occasioned by the negligence of his sub-deputies, the evidence was not sufficient to sustain the plaintiff's case. The postmaster is only held to ordinary diligence in the discharge of the duties of his office; (*Story on Bailm.* 463. 2 *Kent's Com.* 610;) and can only be made liable for losses occasioned by a want of such diligence. And the burden of proof is upon him who alleges negligence, to establish the fact. (*Story on Bailm.* 410, 411. 21 *Pick.* 254. 1 *Esp. Rep.* 314. 1 *Cowen*, 109. 9 *Wend.* 268. 2 *Kent*, 587.) He must also show that the loss was the direct consequence of the particular negligence proved. It matters not that there may have been official misconduct on the part of the defendant. Unless it be shown that the plaintiff's loss was the result of such misconduct, he cannot recover. In this case it does not appear by the proof how, or when, or where, the letter was lost. Whether stolen by a stranger, embezzled by a clerk, or delivered by mistake to the wrong person, there is no proof to show. If lost by either method, the defendant is not liable, unless he has been negligent, and the loss was the consequence of his negligence.

If we were satisfied that the defendant had at times been negligent in the discharge of his official duties, it would still be impossible to decide that the loss in this case was the result of such negligence, until it be proved how the loss occurred. There was therefore an entire failure of the necessary proof to sustain the action; and the plaintiff was rightfully nonsuited. (3 *Hull*, 531. 25 *Wend.* 440.)

It was insisted by the counsel for the plaintiff that the defendant was liable upon a count in trover. If the facts do not show

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that the letter was lost through negligence, they show still less a conversion. No demand or refusal was proved, and hence the defendant was not called upon to show what had been done with the letter.

A new trial must be denied.

SAME TERM. *Before the same Justices.*

BABCOCK vs. THE MONTGOMERY COUNTY MUTUAL INSURANCE COMPANY.

Under a policy of insurance against loss or damage by fire, where one of the conditions of insurance is that the insurers will be liable for "fire by lightning," the underwriters are not liable for the destruction of the dwelling house insured, by its being rent and torn to pieces by lightning without being burnt or consumed.

Unless there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable. There must be a fire, or burning, which is the proximate cause of the loss.

The practice and usage of other insurance companies, restricting their liability to losses occasioned by actual burning by lightning, may be resorted to, to show what the general usage is in regard to losses or damages caused by lightning.

DEMURRER to declaration. The action was on a policy of insurance dated Sept. 21, 1844, by which the defendants insured the plaintiff for the term of five years, to the amount of \$1020 on his dwelling house No. 1 and wood shed, \$300 on his dwelling house No. 2, and in different sums upon other buildings, amounting, in the aggregate, to \$2000, against all losses or damage which the plaintiff might sustain "by, or by reason, or by means, of fire, not exceeding in the whole the sum of \$2000, nor exceeding two-thirds of the value of the said property which may be so lost or damaged," &c. One of the conditions of insurance referred to, in the policy, and made a part thereof, was the following: "The company will be liable for fire by lightning, but not for any loss or damage by fire happening by

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means of any invasion, insurrection," &c. Another condition was, that all persons insured by the company and sustaining "loss or damage by fire," should forthwith give notice thereof to the secretary," &c. The declaration alledged that after the making of the said policy, and during the time therein insured, to wit, on or about the 31st day of August, 1846, the property described in the policy as dwelling house No. 2, and insured for the sum of \$300, was struck by lightning, and was prostrated and demolished and by the said fire by lightning overthrown and destroyed; and that by such fire by lightning the plaintiff sustained loss and damage in the destruction of the said building, to the amount of \$300. The defendants demurred to the declaration, and assigned the following causes: 1. That the policy declared on was a contract for insurance against loss and damage by fire, but that the loss and damage averred and claimed for, in the plaintiff's declaration, were caused by *lightning* and not by *fire*. That the dwelling house No. 2, averred to have been damaged, was *struck by lightning* and thereby prostrated and demolished; and that this was damage by the *electric fluid*, and not by *fire*. 2. That there was no averment in the declaration, of loss or damage by fire, or by reason or by means of fire. That the building was struck by lightning, and its destruction was the effect of the electric shock; that such was the evident intent and meaning of the averment; that no burning was alledged, nor was it averred that the explosion or shock was caused by fire. Joinder in demurrer.

The following stipulation was entered into between the counsel for the respective parties, dated April 17, 1847: "It is hereby stipulated and agreed by and between the parties in the above entitled cause, that the question and the only question to be made on the argument of the demurrer in the case, before the supreme court, or any other court before which it may be brought, after the demurrer book shall have been made up, shall be the same that was submitted to the Hon. John Willard as referee, and no other, viz.: Whether the destruction of dwelling house No. 2, named in the plaintiff's declaration, by being rent and torn to pieces by lightning, without being burnt or consumed, is

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a loss covered and insured against by the policy of insurance set forth and declared upon in said declaration."

Ward Hunt, for the plaintiff. To entitle the plaintiff to recover it is not necessary that there should have been an actual combustion of the subject matter; it is sufficient if fire was the proximate cause of the injury. (13 *John*. 451. 21 *Wend*. 367. 11 *Peters*, 213.) Lightning is fire; and a destruction by lightning is destruction by fire, within the policy. In the ordinary acceptation of language, and according to the popular understanding of the words, lightning is fire. The building "No. 2" having been prostrated and destroyed by lightning, the plaintiff is entitled to recover.

C. P. Kirkland, for the defendants. By the term "fire," as used in the policy, we are to understand the ordinary phenomenon of combustion. To establish a cause of action, it must be affirmatively shown that the rending and demolishing effects of lightning were produced by fire. Lightning is an electrical phenomenon; and though fire is often one of the results of an electric discharge from the clouds to the earth, it is that wonderful and mysterious principle, the *electric fluid*, that produces the shock, and rends and demolishes whatever obstructs its course; and in no sense are those results the products or consequences of *fire*. The words in the policy are *expressly* that the company will be liable for "*fire by lightning*." (1.) The word "*fire*" here is to be construed according to its ordinary signification and meaning. (*Dow v. Whetten*, 8 *Wend*. 167. *Story on Cont.* § 235. *Sleight v. Rhineland*, 1 *John*. 233, 4. *Aquila v. Rogers*, 7 *T. R.* 421, 423. *Roberts v. French*, 4 *East*, 135. 1 *Hall*, 166. 2 *Cowen*, 419. 1 *Phil. Ins.* 43, 4. *Dwar. on Stat.* 762.) (2.) The express statement of liability for "*fire by lightning*" excludes any *other* injury or damage by lightning. And it having been shown that lightning may produce injury and destruction *without fire*; and it being conceded that the injury in this case was by rending and tearing without burning,

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it follows that this damage is not within the policy. (*Dwar. on Stat.* 713. *Wardens of St. Paul's v. The Dean*, 4 *Price*, 78.)

By the Court, PRATT, J. This action was brought upon a policy of insurance against loss by fire. The word fire, in contracts of this kind, should be construed in its ordinary signification. (6 *Bac. Abr.* 658.) It should not be confined to any technical and restricted meaning which might be applied to it upon a scientific analysis of its nature and properties, nor should it receive that general and extended signification which by a kind of figure of speech is sometimes applied to the term; but it should be construed in its ordinary popular sense. Nor is the damage, for which fire insurance companies are liable, to be confined to loss by actual burning or consuming; but they are liable for all losses which are the immediate consequences of fire or burning. (*City Fire Ins. Co. v. Corlies*, 21 *Wend.* 367.) Thus goods injured by being removed to save them from fire, or by water in extinguishing a fire, are within the provisions of the policy. So other cases might be mentioned, where the insurers are liable for damages which can be traced directly to fire as the immediate cause of the loss, and yet the insured article itself be in no danger of being burned or consumed.

But giving to the plaintiff in this cause the benefit of the most liberal rule yet established by legal adjudication, I am wholly unable to arrive at the conclusion that the damage done to the plaintiff's house was a loss within the provisions of the policy.

First. The plaintiff has the *onus probandi* upon himself. In order to entitle him to a recovery he must prove that the loss was occasioned by fire; and as the building was not consumed nor set on fire, he must be able to show that electricity, of sufficient intensity to rend a building, is fire, in the popular and ordinary signification of the term. It is not sufficient to show that fire is one of its constituent principles. He must be able to demonstrate that the rending and destruction of the building were the result of that particular principle. That I think cannot be done in the present state of the science of electricity. It can neither be proved that fire, in its ordinary signi-

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fication, is a constituent element in electricity; nor, if that be so, that its mechanical or rending effects are the consequences of such fire. Of the actual nature of what we call electricity but little is pretended to be known with certainty. It is even a disputed point among scientific men, who have made it the subject of their investigation, whether it be an actual fluid, or merely a property of other matter. (*Ed. Ency. tit. Electricity.*) The only real knowledge which we possess, in relation to it, is a knowledge of its properties derived from observation of its effects. We find that under certain conditions it exhibits phenomena, or effects, which are the most wonderful as well as the most powerful within the observation of man. These phenomena are divided, by writers upon the science, into three classes, the mechanical, the chemical, and the magnetical; and some writers add a fourth, termed the physiological. (*Ed. Enc. tit. Electricity. Sturgeon's Lectures on Elec. 124.*) When the fluid, (if we may be allowed the expression) is excited to a high degree of intensity, the mechanical effects of an electric discharge are manifested by perforating or rending any non-conducting substance against which such discharge may be directed. Excited to a high degree of intensity, its chemical effects are also manifested by fusing metals, and igniting combustible substances. These effects belong to different classes of phenomena, and are, for aught we know, entirely distinct in their character. I have not been able to find any writer, nor was our attention on the argument directed to any author, who insists that the mechanical effects of electricity are produced by its calorific properties, except M. Arago. His theory was that the explosive effects of lightning were caused by its heating properties upon the water and moisture contained in the subject of the explosion. But this theory has not been generally adopted. (*See Lardner's Lectures, subject Electricity.*) Whilst it is admitted that nothing is absolutely known of the method by which heat is evolved in electric phenomena, the theory which is the most generally adopted makes it the result, and not the cause, of the mechanical action. (*Ed. Enc. tit. Heat.*)

Mr. Sturgeon, an able and lucid lecturer upon the subject of
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electricity, suggests the existence of two separate fluids which pervade all matter—the electric and the calorific; that heat is evolved, and ignition produced, by the mechanical action of the electric fluid upon the calorific. (*Stur. Lec. p. 162.*) Without assenting to any of the numerous theories which have resulted from speculations upon the subject by men of science, I only allude to them to show that nothing is known with sufficient certainty to form a basis for legal adjudication.

I may remark, in passing, that it is with a considerable degree of diffidence that I dissent from the positions taken by the learned jurist, Judge Willard, who has written an opinion upon the points involved in this case, and which was cited upon the argument. If I understand the position taken by him, it is that if the lightning had not torn the building to pieces it would have set it on fire, and hence he deduces an argument in favor of holding the company liable.

In the first place, I am unable to find any evidence that there was any such alternative in the case. The phenomena of nature are constant: like causes produce like effects; and there is no evidence that the electric fluid which demolished the house was, under the existing circumstances, capable of setting it on fire, or exhibiting any different phenomena from those which it did exhibit. In the second place, if it were so, it would not alter the case. The contract of the insurers was to indemnify the insured against loss by fire. It by no means follows that they are liable for the damage done by violence to the insured property because the agent by which the violence was effected might have set it on fire. A heated ball or bombshell may injure the building against which it is hurled. It would not do to hold the insurers liable because, if the force which caused it to perforate the wall had been less, or the resistance greater, it might have lodged in the walls and set them on fire.

Secondly. If it could be demonstrated that the mechanical action of lightning is the result of its calorific properties, it by no means follows that the damage is occasioned by fire. The terms caloric and fire admit of very different significations. One is the cause and the other the effect. That which is term-

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ed caloric seems to pervade every material substance. It may be evolved from a snowball or a piece of ice. Fire, on the other hand, is not an elementary principle, but is the effect produced by the application of heat, or caloric, to combustible substances. Walker says that in the popular acceptance of the word, "fire is the effect of combustion." It is therefore equivalent to ignition or burning.

Unless, therefore, there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable. Not that the identical property to which the damage occurred should be consumed, or even ignited, but there must be a fire or burning which is the proximate cause of the loss. It is immaterial how intense the heat may be; unless it be the effect of ignition, it is not within the terms of the policy. The heat of the sun often contracts timber, from which losses occur; but they would not be considered losses by fire. (*Ellis on Fire Ins.* 273. *Steph. N. P.* 1079. 11 *Petersd. Ab.* 18.) Hence in the case of *Austin v. Drewe*, (6 *Taunt.* 436; 4 *Camp.* 360,) it was ruled in the case of an insurance upon the stock of a sugar house, that damage to the stock by the heat of the usual fires in consequence of the accidental mismanagement of the dampers, was not within the policy against loss by fire. Gibbs, Ch. J. ruled, and his ruling was sustained by the court, that if there was a fire it was no answer to say that it was occasioned by negligence or misconduct of servants; but in this case there was no fire, except in the stove where it ought to be, and the loss was occasioned by the confinement of the heat, and not by fire.

Thirdly. The terms of the policy exclude the idea that it was intended to cover damage by lightning when there was no ignition. The words of the policy are that the company will be liable for fire by lightning. 1st. If the company intended to insure against all damage by lightning, it seems strange that they should have used that form of expression—that they had not used the phrase directly, "damage or loss by lightning." If the word fire includes in itself lightning, then one of those words was entirely superfluous. It seems obvious to me, therefore, when the parties to the contract make use of the term "fire by

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lightning," they use the term lightning not as fire itself, but as an agent capable, under certain circumstances, of causing fire. 2d. The use of the same expression, in the books, strengthens this position; for the parties will be deemed to use the term in its legal acceptance. Ellis on fire insurance, page 25, says "that it is sometimes expressly stated to remove any doubt, though little could exist, that losses occasioned by fire from lightning will be made good." Kent, in a note to his commentaries, third volume, edition 1836, says that it has been usually held that losses by fire from lightning are within the policy. It is hardly probable that two writers so correct in the use of language would put in the word fire where it would be utterly superfluous if they did not mean to convey the idea of ignition or burning by it. Lord Ellenborough said in *Gordon v. Remington*, (1 *Camp.* 123,) "Fire is expressly mentioned in the policy as one of the perils against which the underwriters undertake to indemnify the assured, and if the ship is destroyed by fire it is of no consequence whether this was occasioned by a common accident, or by lightning, or by an act done in duty to the state." (1 *Phil. on Ins.* 632.) And in the *Traite des Assurances Terrestres*, by De Querault, cited by Judge Willard, I infer it is used in the same sense. I have not had access to the work, but in the citation by the learned judge, the term lightning is evidently spoken of as the cause of fire, and not fire itself. "La compagnie assure contra l'incendie même contre celui provenant du feu du ciel," as I translate it, reads, "The company insures against burning (conflagration) even against that which proceeds from lightning."

So also Pothier, in his *Traite du Contract d'assurance*, chapter 1, under the head of fire, says, "Les assureurs en sont tenus, lorsque c'est par un cas fortuit comme par le feu du ciel ou dans un combat que le feu a pres au vaisseau." "The insurers are liable when the vessel takes fire by accident, as by lightning, or in battle."

In marine policies losses by fire and by perils of the sea are usually specially mentioned as losses for which the insurers will be liable. Among the former is uniformly classed burning or fire

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by lightning; and among the latter, damage by lightning. Phillips on Insurance, speaking of marine policies, under the head "loss by fire," (*vol. 1, p. 631.*) says, "That the insurers are answerable for the loss when the property is consumed by lightning or takes fire in an engagement with another vessel;" citing Pothier. And under the head, perils of the sea, (*p. 635.*) he enumerates "losses by the winds, waves, lightning, rockshoals," &c. (*See 2 Bac. Ab. 661.*) 3d. The practice of other companies, to the by-laws or proposals of some sixteen of which we were referred upon the argument, instead of weakening, strengthens the view which we have taken of the construction of the present policy. Doubtful terms in a written instrument are to be construed according to the ordinary usages of trade. The practice and usage of so many companies restricting their liability to losses occasioned by actual burning by lightning shows that the general usage is not to be liable for damage by lightning, unless accompanied by burning. A fair construction of those policies would not require that the property should be actually consumed, to entitle the assured to indemnity, but that the lightning should cause a fire which fire should be the proximate cause of the loss; the same as a loss by fire in ordinary cases. If that view be correct, I do not see as the terms of the policies in those cases differ, substantially, from that under consideration. Losses from burning by lightning, and losses from fire by lightning, it seems to me, are equivalent terms, and should be construed as imposing upon the parties the same rights and liabilities.

We are, therefore, of opinion, that the damage which the plaintiff has sustained is not within the provisions of the policy, and that the defendants are not liable in this action. There must be judgment for the defendants upon the demurrer. 14 N. H. 341

Judgment for the defendants.

SAME TERM. *C. Gray, Gridley, and Allen, Justices.*

FLETCHER vs. BUTTON.

In an action brought by the vendee of real estate, against the vendor, for a breach of his covenant to convey the premises, the purchase money having been fully paid before, or at, the execution of the covenant, the plaintiff is entitled to recover the amount of purchase money actually paid by him, with interest thereon for a period not to exceed six years.

Whether, in such a case, a more stringent rule might not be adopted, and the plaintiff be allowed to recover the value of the land at the time of the refusal to convey, with interest from that time? *Quære.*

Whether the purchaser has been in the occupation of the premises at all, or whether he was in possession up to the time of the trial, is immaterial, and cannot affect his right to sustain the action.

A breach of the contract alone entitles the purchaser to an action; and such a breach occurs when the vendor, upon request, refuses to convey the premises.

In such an action the defendant, under proper pleadings, may be permitted to show that a balance remains due to him upon a note given for the purchase money, and to produce and cancel the note, at the trial, with a view to a deduction of that sum, with interest, from the amount the plaintiff is entitled to recover.

THIS was an appeal, by the defendant, from the judgment entered in this action upon the verdict at the circuit. On the 13th of April, 1841, the defendant gave his bond to Isaac Fletcher and Isaac Fletcher, jun. conditioned to execute or cause to be executed to the obligees a *good and sufficient warranty deed* of the premises therein described, *free of all incumbrances*, by the 1st of January, 1842, in consideration of \$500 which he acknowledged in the bond to have been received and paid *in full satisfaction* for the premises. The plaintiff, Isaac Fletcher, jun. became sole owner of the bond, by assignment from the other obligee, and repeatedly requested the defendant to give a deed and to perform the condition, which he refused, on the ground that he had no deed himself, and could not convey any title. The plaintiff, after waiting six years and eight months for the defendant to obtain title and perform the condition, brought this action upon the bond, and claimed to recover as

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damages for non-performance of the condition the purchase moneys paid, and six years' interest thereon. The defendant, by his answer, claimed to be allowed for the use of the premises by the purchasers, as a set-off against the claim of the plaintiff. He also claimed that the purchase moneys *actually* paid were less than \$500; and he set up no other defense. The jury found, under the instructions of the court, a verdict for the plaintiff for \$657,31, being the amount of purchase moneys actually paid, as proven by the defendant's witnesses, and six years' interest thereon.

S. T. Fairchild, for the plaintiff.

W. J. Hough, for the defendant.

By the Court, ALLEN, J. The principal question presented for our decision upon the appeal in this cause, and upon which the other questions made upon the trial in some measure depend, is as to the proper rule of damages in an action brought by the vendee of real estate against his vendor, for a breach of his covenant to convey the premises, the purchase money having been fully paid before or at the time of the execution of the covenant. The counsel for the appellant insists 1. That no action can be maintained, for the reason that the plaintiff was at the commencement of the action in possession of the premises, and had not put the defendant in the same situation in which he was before the contract; and has cited in support of his position various authorities. But the decisions to which we are referred, are cases in which the plaintiffs have sought to rescind the contract on account of the default of the vendor, and have brought actions for the purchase money as for money paid upon a consideration which has failed. And the courts have held in that class of cases that the contract could not be rescinded at the option of one party, so as to enable him to maintain an action for money paid, when the other party could not be placed in his former position, which could not be done when the vendee had had the possession of the premises, but that the remedy of the

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party was upon the special contract to recover the damages sustained by him. (2 *Phil. Ev.* 89. *Hunt v. Silk*, 5 *East*, 449. *Conner v. Henderson*, 15 *Mass. Rep.* 319. *Fuller v. Hubbard*, 6 *Cowen*, 13.) But it has been held that such action would lie notwithstanding the possession of the vendee for a time, if the vendor had refused to perform the contract and resumed the possession of the premises. (*Gillett v. Maynard*, 5 *John.* 85.)

The present action, however, is not brought to recover back the purchase money, in disaffirmance of the contract, but is in affirmance of and directly upon the contract, for the recovery of damages for a breach of it. And whether the plaintiff has been in the occupation of the premises at all, or whether he was in possession up to the time of the trial, is immaterial, as it can not affect the right of the plaintiff to sustain the action. A breach of the contract alone entitles a party to an action, and there was such breach when the defendant, upon request, refused to convey the premises. (*Delavergne v. Norris*, 7 *John.* 358. *Prescott v. Truman*, 4 *Mass. Rep.* 627.)

It is insisted, secondly, that the plaintiff, being in possession of the premises up to the time of the commencement of the action, he can recover but nominal damages; that actual eviction was necessary to entitle him to recover the entire purchase money by way of damages for the non-conveyance. I am unable to discover upon what principle the possession of the premises by the plaintiff can affect his remedy in this action. The contract, for the non-performance of which this action is brought, was for the title to, and not the possession of, the premises. The possession of the premises could not have been in part performance of such contract; and although it may have been beneficial to the plaintiff it did not at all mitigate the damages sustained by him by the inability or unwillingness of the defendant to convey the premises. Again; if the defendant had title to the premises, and a right to convey them, and has wilfully refused to perform his contract, he has done so in his own wrong, and has voluntarily placed himself in a position in which he may lose the use of the premises for the time during which the plaintiff has occupied them; but he can not be permitted,

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by his own wrongful act, to change the character of the possession of the plaintiff, and make him a tenant, against his will, instead of a vendee in possession under a contract of purchase. If the defendant was not the owner, but had the right to occupy, or permit the plaintiff to occupy, the premises, then, having contracted to convey them to the plaintiff and suffered him to go into possession under the contract, although he may have acted under a mistake, still he must bear the consequences of that mistake. The plaintiff had a right to suppose that the defendant was familiar with his own title, and had the right to sell what he agreed to convey. (*Jackson v. Wood*, 3 *Caines' Rep.* 111, *per Spencer, J.* *Hopkins v. Grazebrook*, 6 *B. & C.* 31, *per Abbott, C. J.*) If the defendant neither owned the premises nor had the right to occupy them, or to suffer the plaintiff to occupy them, then it is very clear that he should not in any manner have the benefit of the possession by the plaintiff. The plaintiff, by his occupation, has made himself a trespasser, and is liable to the true owner, for the value of such occupation.

In *Calkins v. Harris*, (9 *John.* 324,) the plaintiff in an action for a breach of the covenant of seisin in a deed of conveyance, was held entitled to recover the consideration money and interest for six years, notwithstanding the plaintiff had remained in possession of the premises granted, up to the time of the trial. And Sutherland, J. in *Baldwin v. Munn*, (2 *Wend. R.* 399,) says that in an action of covenant for not conveying, the rule of damages upon an eviction of real estate should control, by the force of analogy. The rule of damages is the same in an action for a breach of the covenant of seisin as in an action for breach of a covenant for quiet enjoyment after eviction. (*Pitcher v. Livingston*, 4 *John.* 1. *Bennett v. Jenkins*, 13 *Id.* 50. *Staats v. Ten Eyck*, 3 *Caines*, 111. *House v. House*, 10 *Paige*, 158.)

In *Gillett v. Maynard*, (5 *John.* 85,) the plaintiff was allowed to recover the money paid by him upon a contract for the purchase of real estate, with interest, notwithstanding he had been in the occupation of the premises; the defendant having volunt-

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tarily rescinded the contract by refusing to convey, and reserving the possession of the land.

The measure of damages adopted by the judge at the trial was as favorable to the defendant as he could ask ; and it may be doubted whether a more stringent rule might not have been adopted, and the plaintiff have been allowed to recover the value of the land at the time of the refusal to convey, with interest from that time.

In *Hopkins v. Grazebrook*, (6 B. & C. 31,) a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him. And it was held that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. The defendant brought into court the deposit made by the plaintiff on the purchase, and his expenses, and a small sum for nominal damages. The judge, on the trial, told the jury they were not bound to confine their verdict to nominal damages, and a verdict was rendered for the plaintiff for £70 damages, which the court of king's bench refused to disturb. Abbott, C. J. says, "Upon the present occasion I will only say that if it is advanced as a general proposition that when a vendor can not make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it." And he distinguishes the case from *Flureau v. Thornhill*, (2 W. Bl. 1078,) in which the vendor, the defendant, was the owner of the estate, but the title was objectionable, and he had offered the plaintiff his election either to take the title with all its faults, or to receive back his deposit with interest and costs, and in that case, under the circumstances, the court held that the plaintiff was only entitled to his money with interest and costs. In *Hopkins v. Lee*, (6 Wheat. Rep. 109,) the supreme court of the United States decided that in an action of this kind the proper measure of damages was not the

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price stipulated in the contract, but the value at the time of the breach. In *Baldwin v. Munn*, (2 *Wend.* 399,) the supreme court of this state did not adopt this rule, but applied the rule in *Flureau v. Thornhill*, to a case very similar in its circumstances. The vendor in *Baldwin v. Munn* acted in good faith, and believed he had a title to the premises, and no part of the purchase money had been paid. The court adopted the rule of damages in case of eviction, as settled by the courts of this state. Sutherland, J. distinguishes the case of *Hopkins v. Lee* from an action upon a simple covenant to convey, and also remarks "that the rule of damages upon an eviction of real estate does not appear to have been settled in that court when the case of *Lee v. Hopkins* was decided." But Livingston, J. in *Hopkins v. Lee*, does not place his decision upon any principle other than the general principle which should control and measure the damages in actions between vendees and vendors, and lays down the proposition broadly, and does not refer to any peculiarity in the contract upon which that action was brought. It is also evident that he supposed that a different rule might prevail in an assessment of damages in case of an eviction upon a covenant contained in a deed; for he says: "This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case." In Kentucky it has been held that when the vendor was, without fraud, incapable of making a title, the rule of damages as settled by *Flureau v. Thornhill* was the true rule, and the vendee was entitled to recover the purchase money and interest; (*Allen v. Anderson*, 2 *Bibb*, 415;) but that when the vendor fraudulently sold land to which he knew he had no claim, the measure of damages in equity was the value of the land at the time of impannelling the jury. (*McDonnell v. Dunlop*, *Hardin*, 41.) The value of the land at the time of the demand of a conveyance is held to be the measure of damages in an action upon a bond like the one in this case, in the state of Maine. (*Hill v. Hobart*, 16 *Maine Rep.* 164.) All the cases agree, however, that the least that the plaintiff is entitled to is the purchase money actually paid,

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and interest; and this rule was adopted by the judge at the trial.

It is however insisted that interest should not have been allowed, for the reason that the plaintiff had been in possession and received the mesne profits, which should be a compensation for the interest of the purchase money. The judge upon the trial applied to this case the rule of damages, in this respect, which has been settled as applicable to actions upon covenants for quiet enjoyment or of seisin, after eviction. The defendant is not entitled to any more liberal rule. In actions for eviction a party has been allowed only to recover interest to the extent of his liability for mesne profits; and as that is limited to the last six years, the recovery of interest for a period anterior to that time has not been allowed. (*Calkins v. Harris*, 9 John. 325. *Pitcher v. Livingston*, 4 Id. 1. *Bennett v. Jenkins*, 13 Id. 50. *Bickford v. Paige*, 2 Mass. Rep. 455. *Kelly v. Dutch Church of Schenectady*, 2 Hill, 105.) Even if it is true that the plaintiff in a case like the present should not receive interest when he would not be liable for mesne profits, for the reason that he had occupied by the assent of the defendant, who was the owner of the premises and might have made a title thereto, and would not, which I do not think entirely clear, still there is nothing in the evidence given, or in that offered to be given by the defendant, which should entitle the defendant to be relieved from the payment of interest in this case. The defendant admitted that he could not make a title to the premises, for the reason that he had no title himself; and there was no evidence that the defendant had a title, or the right to the possession to the premises, so that he could protect the plaintiff from an action for the mesne profits, at the suit of the rightful owner. The evidence offered did not tend to establish the fact that the plaintiff was not liable to any person other than the defendant, for mesne profits; or that the defendant had the right to the possession of the premises; or that the plaintiff was not a trespasser. 1. The defendant did not propose or offer to show in whom the title to the premises was, or that Roberts had any authority either from the true owner, or any other per-

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son, to sell the premises, or to contract to sell them ; and 2dly. It does not appear that the contracts for the purchase, under which the defendant would be understood as claiming some interest in the premises, gave him or any of those under whom he claimed a right to the possession of the premises. If they were mere contracts to sell they did not give a license to enter, unless a right to the possession was given by their terms. The evidence was properly excluded. The defendant proposed to prove, upon the trial, that on the purchase of the premises by the plaintiff and his co-purchaser they gave to the plaintiff their note for the purchase money, and that a small balance remained unpaid thereon ; and he insisted that such evidence was proper, with a view to show the amount actually paid by the plaintiff, and which, under the rule of damages adopted by the court, he was entitled to recover back with interest. I am inclined to think that if the rule by which the damages were assessed was the correct rule, the defendant, under proper pleadings, should have been permitted to produce the note and cancel it at the trial, with a view to a deduction of the amount actually unpaid from the amount of the purchase money. If the plaintiff is allowed to recover by way of damages the amount unpaid upon the note, as for so much money actually paid, the note may be collected, as the consideration will not have failed ; and to avoid circuity of action, the whole matter might very properly have been settled in this suit. But the answer of the defendant does not set up the note, or in any way alledge that any part of the purchase money agreed to be paid, remains unpaid. On the contrary it impliedly admits the payment, by alledging that the amount recited in the bond of the defendant as having been paid was not the true sum paid, but that the true amount paid was about two hundred and fifty dollars, thus making the issue upon the amount of the consideration, and not upon the actual payment of the purchase price. If the defendant had intended to insist that the whole or any part of the purchase money had not in fact been paid, he should have set it up in his answer. He might as well insist that no part of the agreed price had been paid, as to insist, under his answer,

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that a part of it was in arrear. The code contemplates a full statement in the pleadings of every material fact relied upon by the parties. (*Code*, §§ 118, 128. *Notes of Commissioners to § 118. James v. McKerman*, 6 *John*. 543.)

The views advanced, if correct, dispose of all the questions made upon the trial and presented by the record, and the judgment must be affirmed.

Judgment affirmed.

SAME TERM. *C. Gray, Pratt, Gridley, and Allen, Justices.*

RUSSELL vs. HUBBARD.

A warrant of commitment, issued by a justice of the peace, upon a conviction for petit larceny, is void, unless it be directed to the officer, or class of officers, by whom it is to be executed; and will afford no protection to a constable who executes it.

The legislature, by the section of the statute relative to warrants of commitment, issued by courts of special sessions, did not intend to prescribe a form for such warrants, or to vary the common law rule respecting them. Hence a warrant which would be good at common law, will be valid under the statute.

DEMURRER to plea. The facts are sufficiently stated in the opinion of the court.

S. H. Stafford & T. Jenkins, for the plaintiff.

F. Kernan, for the defendant.

By the Court, ALLEN, J. This is an action for assault and battery and false imprisonment, in which the defendant justifies by plea, as a constable under a warrant of commitment, issued by a justice of the peace of the county of Oneida, upon a conviction of the plaintiff for the offense of petit larceny. The

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defendant, in his plea, has set out the warrant in *hæc verba*. It is not directed to any officer, or class of officers, or to any other person; and the plaintiff has demurred to the plea; assigning the want of a direction in the warrant as one of the causes of demurrer.

The statute (2 R. S. 716, § 31) provides that the judgment of every court of special sessions shall be executed by the sheriff, constables or marshals of the county, or city and county in which the conviction shall be had, by virtue of a warrant under the hand of the magistrates who held the court, or of a majority of them, *to be directed to such officers, or to such of them as may be necessary*, and specifying the particulars of such judgment."

If this statute does, as was urged by the counsel for the plaintiff, prescribe a form for a warrant of commitment, then every such warrant must substantially conform to the statute, (*Davison v. Gill*, 1 East, 64; *Goss v. Jackson*, 3 Esp. Rep. 198,) and the want of a direction, if such direction forms a part of the prescribed form, is a valid objection to the warrant now before us. But I am of the opinion that by the statute referred to, the legislature did not intend to prescribe, and have not prescribed, a form of a warrant to be issued by magistrates upon conviction by courts of special sessions. The object of the statute was two fold. 1. To require warrants, upon convictions of this character, to be executed by certain officers, and to authorize them to be executed by sheriffs as well as constables, and to prohibit their direction to, or execution by, private individuals, at the discretion of the magistrate; (1 Chit. Cr. L. 38; *Rex v. Kendal*, 1 Ld. Raym. 66; 1 Salk. 347;) and 2dly. To make a statement of the judgment in the warrant sufficient, without showing upon its face the particular circumstances giving the court jurisdiction, as was required at common law. (*Bradstreet v. Ferguson*, 23 Wend. 638.) It is not necessary to hold that a form for a warrant is prescribed, which must be substantially followed, in order to give the statute full force and effect. A warrant upon a conviction by a court of special sessions, which would be good at common law, and which did not contravene

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the statute, would, I think, be good under the statute. It did not intend to vary the common law, by making a mere formal warrant necessary to protect officers acting under it. If the common law does not call for a direction to every warrant, as requisite to its validity, I think we can safely hold that the statute in that respect, is directory merely, and that the warrant in this case is valid, without a direction. (*Pond v. Negus*, 3 *Mass. Rep.* 232. *People v. Allen*, 6 *Wend.* 486. *Same v. Peck*, 11 *Id.* 604. *Marchant v. Langworthy*, 6 *Hill*, 646. *Ex parte Heath, et al.* 3 *Id.* 42. *Gale v. Mead*, 2 *Denio*, 232. *King v. Leicester*, 7. *B. & C.* 6.) But I am of the opinion that a warrant is defective without a direction, and that the statute, in speaking of the direction, recognizes and adopts the requirements of the common law. Although the statute provides that the judgment of a court of special sessions shall be executed by certain officers, still they derive their authority from the warrant issued by the magistrates. That alone authorizes them to do an act which, without it, they would have no right to do. The act is lawful with the authority, which without it would be unlawful. A constable can not, because he is constable, and because a court of competent jurisdiction, and whose process he may lawfully execute, has pronounced a judgment upon which a person may be imprisoned, take him in execution, without further authority. This being so, I can see no reason why the person who is authorized to do the act, should not be pointed out by the instrument under which he derives his authority; especially where there are several classes of officers, to either of which, or to any individual of either, the magistrate may direct the authority to perform the duty. The elementary works, in speaking of the form and requirements of a warrant, all speak of the direction as an essential and material part of it. (1 *Chit. Cr. L.* 38.) It must be executed by the person to whom it is directed. (*Id.* 48. *Housin v. Barrow*, 6 *T. R.* 122.) Russell, in his treatise on crimes, &c. page, 618, says, "every warrant ought to specify the offense charged, the authority under which the arrest is to be

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made, the person *who is to execute it*, and the person to be arrested." (*And see Conk. Tr.* 400.)

Barbour, in his criminal treatise, says, "the warrant must be properly directed." And again: "a warrant not directed to any particular person or officer is bad;" and to the latter proposition he cites Addison's Pennsylvania Reports, 376. (*See also Reg. v. Wyatt*, 2 *Ld. Raym.* 1189; 15 *Pet. Abr.* 358; *Bac. Abr. Constables, D.*) In *King v. Weir*, (1 *B. & C.* 288,) Bailey, J. says, "It is of great consequence that magistrates should be careful to direct their warrants in such a manner that the parties to be affected by them may know that the persons bearing the warrants are authorized to execute them." "A magistrate has power to direct his warrant to a particular person by name, and then the latter has an authority coextensive with that of him who confers it. But a warrant may also be directed to a person not by his name as an individual, but by the description of his official character; and such direction may be limited to the officer of a single parish, or may extend to all the officers of the county." (6 *Pet. Abr.* 132, 133.) All tending to show the importance of the direction as the part of the process from which the particular individual executing it derives his authority. The officer derives his authority from the warrant alone. So long as the warrant is not directed it is but a recital of the conviction and judgment, and is not valid as a process. The direction gives it vitality and existence as a warrant. A delivery to a proper officer is not the direction required by law. The direction, like every other part of the warrant, must be in writing.

Hawkins, in prescribing the form and requisites of a valid warrant, assumes that the direction is a material and essential part of it, and says, "seventhly, that it may be directed to the sheriff, bailiff, constable, or any indifferent person by name, who is no officer;" and in treating of the manner of its execution, he says, "Secondly. That the sheriff having such warrant directed to him, may authorize others to execute it, but that every other person to whom it is directed must personally execute it. Thirdly, that if a warrant is generally directed to all constables, no one can execute it out of his own precinct; but

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if it is directed to a particular constable by name, he may execute it any where within the jurisdiction of the justice." (2 *Haw. P. C.* 135. 1 *Hale*, 581. 2 *Id.* 110. *Ld. Raym.* 546, *per Holt. C. J.*) The direction enters into and forms a part of the definition of warrants. (*Webs. Dic. Jacob's Law Dic. Bouv. Law Dic. title Warrant, and authorities cited.*)(a)

Sir William Blackstone, in speaking of warrants to arrest for crime, says, "this warrant ought to be under the hand and seal of the justice, should set forth the time and place of making and the cause for which it is made, and should be directed to the constable or other peace officer, (or it may be to any private person by name,) requiring him," &c. (4 *Bl. Com.* 290.

The process under which the defendant attempts to justify in this case, is fatally defective for the want of a direction; and for that reason, judgment must be given for the plaintiff on the demurrer.

Judgment for the plaintiff.

(a) See also *Holthouse's Law Dic. tit. Warrant.*

LIVINGSTON GENERAL TERM, July, 1849. *Maynard,*
Welles, and Selden, Justices.

O'MALEY v. REESE.

In an action by a party to a wager on the result of an election, against the stakeholder, to recover back the amount of his deposit, the plaintiff may succeed without proving a demand of the money before the result of the wager was known.

Form of a special count by a party to a wager, against the stakeholder, to recover back his deposit.

The plaintiff may recover in such an action, under the count for money had and received.

The omission to refer to the statute against betting and gaming, in the declaration, is at most a formal defect, and can only be objected to by special demurrer.

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MOTION to set aside report of referee. The declaration contained two counts, the first of which was in the following form: "Monroe county, ss. James O'Maley, plaintiff in this suit, by Paine and Cochrane, his attorneys, complains of John Reese, defendant, by declaration without writ of a plea that the said defendant render unto the said plaintiff, the sum of two hundred dollars which he owes to and unjustly detains from the said plaintiff. For that, whereas, heretofore, to wit, on the tenth day of October, in the year one thousand eight hundred and forty-six, at the city of Rochester, in said county, the said plaintiff and one Samuel M. Nevins entered into a wager in the sum of one hundred dollars, depending upon the result of the general election in the state of New-York, in the year aforesaid, and the said plaintiff then and there deposited a large sum of money, to wit, the sum of one hundred dollars in the hands of said defendant, as stakeholder, to abide the event of such wager. And the plaintiff avers that he did afterwards, to wit, on the day and year aforesaid, demand the said sum of one hundred dollars from said defendant, and the said defendant then and there refused to pay the same to the said plaintiff and still refuses so to do, to wit, at the city and county aforesaid."

The other was a common count in debt for money had and received to the plaintiff's use, in the usual form.

The defendant pleaded *nil debet*. The cause was referred to a referee, and was tried before him, who reported in favor of the defendant. He made a special report under an order of the court, stating that on the hearing before him, the following facts were proved:

1. That on the evening of the election, to wit, November 3, 1846, at the store of A. S. Alexander, in the city of Rochester, the plaintiff and one Samuel M. Nevins entered into a wager of one hundred dollars upon the election of Silas Wright for governor, at the general election on the day aforesaid. 2d. That the plaintiff and said Nevins, on the same evening, each placed in the hands of the defendant John Reese, as stakeholder, the sum of one hundred dollars. 3d. That such wager was made, and the money deposited before the result of the election was

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known, and no demand was made on the defendant until after the result of the election was known. 4th. That after the result of the election was known, and before the commencement of this suit, the plaintiff sent an order to the defendant for the hundred dollars, and the defendant declined to pay it. The referee reported in favor of the defendant on the ground that the facts proved did not entitle the plaintiff to recover, under the declaration.

The plaintiff moved to set aside this report.

Paine & Cochrane, for the plaintiff.

Bowne & Benedict, for the defendant.

By the Court, WELLES, J. The objection to the plaintiff's recovery in this cause appears to be, that the declaration does not refer to the statute, and is, therefore, a declaration at common law; and that being so, the plaintiff could not recover without proving a demand of the money before the result of the wager was known. The referee certifies that the ground on which he reported in favor of the defendant was, that the facts proved did not entitle the plaintiff to recover, under the declaration in the cause. The declaration sets forth the wager, the deposit of the money with the defendant as stakeholder, to abide the event of the wager, and that the defendant refused to pay it back on demand. This is all proved, with the additional facts that the wager was made and the money deposited before, and that the demand was made after the result of the wager was known; and that the wager was upon the election of Silas Wright as governor. The declaration also contains a count for money had and received.

The statute makes all wagers, bets, or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, unlawful; and declares void all contracts for or on account of any money or property or thing in action so wagered, bet or staked. (1 R. S. 662, § 8.) The next section

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gives to any person who shall pay, deliver, or deposit any money, property, or thing in action, upon the event of any wager or bet therein prohibited, the right to sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, or whether any such wager be lost or not. (§ 9.

I am not able to perceive any good reason why the count for money had and received is not sufficient in this case. The statute declares the transaction unlawful, and the contract, under which the defendant received the money, void. It also gives the plaintiff the right to sue for and recover the money back from the defendant. It does not even require a demand of the money before bringing the suit. The one hundred dollars was so much money in the defendant's hands, belonging to the plaintiff, and which the defendant had received under a contract or arrangement which the law prohibited, and which money the same law expressly allows the plaintiff to recover back, without directing the form of action he must use. The general rule is that where money has been received by the defendant, which *ex æquo et bono*, ought to be paid over to the plaintiff, it may be recovered by the plaintiff under the count for money had and received to his use. (1 *Chit. Pl.* 341.)

Where a payment has been made on a contract which has been put an end to, as where, either by the terms of the contract it was left in the defendant's power to rescind it, and he does so, or where the defendant afterwards assents to its being rescinded, this count may be supported. (*Id.* 343.) It would seem that upon the same principle, where money is received upon a contract utterly void, the general count should be sufficient, in an action to recover it back.

In *Pickard v. Banks*, (13 *East*, 20,) this form of declaring was used in an action to recover money of a stake holder which the plaintiff had won upon a wager.

But I am clear that under the special count the plaintiff was

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entitled to a report in his favor. All the material facts alledged in it were substantially proved. If the declaration was defective, the defendant should have demurred, or have moved in arrest of judgment. The plaintiff by his proof sustained the issue on his part. And I incline to the opinion that if a special count was necessary, this one would be held good, at least on general demurrer, or on a motion in arrest of judgment. The plaintiff shows a case within the statute. The statute is a public one, and the defendant is chargeable with knowledge of its existence. The omission to refer to it, at most, is a formal defect, and can only be objected to by special demurrer.

For these reasons the report of the referee should be set aside.

Report set aside.

RENSSELAER CIRCUIT, June, 1849. *Hand, Justice.*

PEETS vs. BRATT.

Where a complaint alledged that on a certain day, and at a certain place, the defendant, by his promissory note in writing, for value received, promised to pay to the plaintiff or bearer, a specified sum; that he had not paid the same; but was indebted to the plaintiff therefor; *Held*, on demurrer, that this was sufficient; although there was no allegation that the defendant delivered the note, and the complaint did not state when the note was payable, nor whether the same was due, or not, nor that the plaintiff was the owner or holder of the note.

THIS was a demurrer to the complaint. The complaint alledged, that on a certain day, and at a certain place named therein, the defendant, "by his promissory note in writing for value received, promised to pay" to the plaintiff "or bearer, the sum of eight hundred and thirty-nine dollars with interest, and he has not paid the same, but is justly indebted to the plaintiff therefor; wherefore the plaintiff demands judgment," &c. The

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causes specified in the demurrer were, "that the complaint does not state that the note in said complaint mentioned, was ever delivered to the plaintiff, or any other person, as for a valid note. That the complaint does not state when said note was payable, by the terms of it; nor whether the same is or is not due;" and it "does not state, whether the plaintiff is or is not the owner or holder of said note."

M. I. Townsend, for the defendant.

J. Pierson, for the plaintiff.

HAND, J. In *Churchill v. Gardner*, (7 T. R. 596,) the declaration alledged that one Bavin made the bill of exchange, directed to the defendant, requesting him to pay the plaintiff or order, and that the defendant accepted it. There was a demurrer, because it was not stated that Bavin delivered the bill to the plaintiff. But the court said the delivery was included in the allegation that B. made the bill. That if B. did not intend to put it in circulation when he made it, that was matter of defense under the general issue. (And see *Smith v. McClure*, 5 East, 476.) The new forms of pleading adopted by the English courts in 1831, (See 7 Bing. Rep.) state that the note was "delivered," &c. but Mr. Chitty, in a note, says this is unnecessary. (*Chit. on Bills*, 551, note, 10th Am. ed.) The old forms contain the same allegation, (see Vol. 2 of *Chit. Plead.*) but upon these, Mr. Chitty makes the same remark. (*Chit. on Bills*, 360, 490, note 12, 7th Am. ed. 73, 573.) *Churchill v. Gardner* was on a bill of exchange, but the court put a note upon the same footing, and so does Mr. Chitty. Two of the new forms upon which Mr. C. comments, (first and third,) are upon promissory notes. (And see *Cunliffe v. Whitehead*, 3 Bing. N. C. 828.) In *Henry v. Burbidge*, (3 Id. 501,) it was held that in an action by indorsee against drawer a promise must be alledged. But Tindall, C. J. said an action against an acceptor rested on different grounds, and "the acceptance constitutes, in effect, a promise to pay, and the liability of a

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payor is like that of an acceptor, in most respects. Perhaps it would have been as well to have insisted upon an allegation of delivery; and this complaint is very loose. But it seems to me *Churchill v. Gardner* must control, until overruled. Of course, the note must in fact be delivered. (*Chamberlain v. Hopps*, 8 *Verm. Rep.* 94.) But in pleading, other words are deemed equivalent. This complaint states that the defendant, by his note, promised to pay the amount of the note to the plaintiff, and that the defendant is justly indebted to him therefor. This, I think, is at least equal to an allegation that the defendant made the note.

The remaining objections are not tenable. If the plaintiff has parted with the note, the defendant must show that fact. And as to the time of payment, where no time is expressed in the note, that is fixed by law. (*Gaylord v. Van Loan*, 15 *Wend.* 308. *Thompson v. Ketchum*, 8 *John.* 146.)

The plaintiff must have judgment, with leave to the defendant to amend on payment of costs.

Judgment for the plaintiff.

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A

ACCOUNT STATED.

See CORPORATION.

ACTION ON THE CASE.

1. In an action on the case for deceiving and defrauding the plaintiff, by obtaining property from him without paying for it, under pretence of a purchase, and upon false representations as to the solvency of the purchasers, it is proper to submit it to the jury to determine, upon the evidence, whether the representations alledged were made; and whether, if made, they were false; and if false, whether they were made with intent to defraud and deceive the plaintiff. *Armstrong v. Tuffis*, 432
2. Such a charge is equivalent to a direction that it is necessary there should have been a *scienter*. *ib*
3. Where a person lawfully coming into the possession of the property of another has parted with the same, previous to the making of a demand by the owner, the remedy of the owner, against such person, is not by an action of trover, but by a special action on the case, or in *assumpsit*. *Kelsey v. Griswold*, 436

ADULTERY.

See DIVORCE.

AGREEMENT.

1. The acts of part performance which will estop a party from insisting upon

the statute of frauds, in defence of an action upon an agreement, must be on the part of the person asking a performance, and not by the person insisting upon the statute. *Rathbun v. Rathbun*, 98

2. To constitute a part performance of a parol agreement which will estop a party from insisting on the statute of frauds, the acts of such party must be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement of which they are a part execution. And they must be a part performance of the precise agreement set up. *ib*
3. On the 2d of December, 1846, H. agreed to charter to S., and S. agreed to take from him, the ship *Jessore*, then on her passage from Havre to New-York. She was to be laden with flour by S. for Liverpool or London. And it was further agreed that should the said vessel arrive in New-York on or before the 10th of the said month of December, then the agreement was to be in full force, but should she not arrive on or before that time, S. had the option of *continuing* the agreement or not. The vessel did not arrive until the 23th of December, and S. on that day elected to continue the agreement. In an action by S. against H. for the non-performance of the contract on his part; *Held* that the promise of S. to charter the vessel furnished a good consideration for the promise on the part of H.; it being a case of mutual promises. *Sage v. Hazard*, 179
4. *Held also*, that the option reserved to S., of continuing the agreement, or not, terminated on the 11th of December, and could not be exercised after the arrival of the vessel, on the 23th. *ib*

5. There are cases where an option reserved to a party may be exercised within a reasonable time, and what is a reasonable time is a question of fact for the jury. *ib*
6. But such a question can not arise where the agreement itself can be fairly construed to settle the time at which the option is to be determined. It then becomes a question of law for the court. *Per HURLBUT, J. ib*
7. Where the circumstances of the transaction show that a debtor, discharged by the acceptance of another security, has, by reason of the arrangement, put himself into a position where he may, or must, be prejudiced if held liable for the debt, this constitutes a legal consideration for the creditor's discharging him. *Livingston v. Radcliff, 201*
8. Where, in an action against a party for a forfeiture of a contract executed in duplicate, the copies produced by the respective parties vary in their phraseology, the court will follow the copy which is in the defendant's hands and by which he was governed in making his payments. *Judá v. Ensign, 258*
9. Where, by the terms of a contract, dated Dec. 24th, for the sale and purchase of land, the payments were to be made as follows: "\$100 on the date hereof, \$100 by the 1st of May next, and the residue to be paid in annual payments of \$100 each, with interest on the whole sums unpaid from the date hereof," *Held* that the "residue" was payable in annual payments computed from the 1st of May, and not from the date of the contract. *ib*
10. In expounding a written instrument, the antecedent and surrounding circumstances are competent evidence, for the purpose of placing the court in the same situation, and giving it the same advantages for construing the instrument, as is possessed by the parties who executed it. *Bellinger v. Kells, 273*
11. K. and B. entered into a written contract, by which K. leased a farm and personal property to B. for one year, at a specified rent. And it was covenanted and agreed by K. that in case B. should "*at any reasonable time*" pay to K. the interest on the money paid by K. towards the property, and secure the said purchase money, he would deed and convey such property to B. Under this agreement B. continued in the possession and occupation of the property, paying the stipulated rent, for several years; the agreement being continued from year to year by implication. On a bill by B. against K. to compel a specific performance of the contract to convey the property to him; *Held* that the "reasonable time" within which B. had the right to pay or to secure the payment of the purchase price, and to have a conveyance, did not expire with the current year after the date of the contract; but that the rights of the parties were to be adjudged as though a new agreement, with the clause concerning the sale of the property, had been made each year, or at the expiration of the period covered by the preceding one; especially as K. had stood by and seen the farm rendered more valuable by permanent improvements, without setting up any claim that the condition conferring on B. the right to purchase had become forfeited. *ib*
12. *Held also*, that the execution of the new agreement between the parties, omitting the clause giving to B. the right to purchase the property, did not cut off the right of B. to avail himself of that provision in the former agreement, where it appeared that, so far as that provision was concerned, the old contract was, by the express agreement of the parties, still to remain in force. *ib*
13. In March, 1845, the plaintiff entered into a contract with the D. and H. Canal Co., whereby he agreed to *take charge of, and navigate*, a boat, during the season, in conformity with the orders and directions of the company, and to hold himself accountable to them for any injury done to the boat. The company agreed to pay for every ton of coal delivered at R., by the boat, certain stipulated prices, reserving \$8 on each trip, towards the payment of the value of the boat, and when the sums so reserved should amount to \$225 and interest, a title was to be given to the plaintiff, for the boat. But in case of failure to pay for the boat, as stipulated, or the termination of the agreement by the company whilst the value of the boat, and the interest, remained unpaid, then the sums reserved were to accrue to the company *for the use of the boat*.

The company also reserved the right to terminate the agreement, at pleasure, and to take the absolute possession of the boat, &c. Under this contract, the plaintiff ran the boat through the season, and then laid it up in the canal; having paid \$136 towards the purchase of the same. The boat, while thus laid up, being levied upon by a tax collector, and sold, as the property of the D. and H. Canal Co.; Held that the plaintiff had not such an interest in the boat as would enable him to maintain an action of trover therefor, against the collector. *Truthill v. Wheeler*, 362

14. It is well settled that a contract providing for the performance of an illegal act, and having its consideration in such act, can not be enforced; but where the contract is disconnected with the original unlawful act, and is founded on a new and distinct consideration, although for money advanced in satisfaction of an unlawful transaction, an action may be maintained upon it. *Hook v. Gray*, 398

See DAMAGES.

HUSBAND AND WIFE, 8, 9, 10.
PARTNERSHIP, 15.

AMENDMENT.

1. The denial of a motion to amend, where the law reposes a discretion in the judge, is not an appropriate ground of exception. *Roth v. Schloss*, 308
2. To sustain an exception for a refusal of the judge, at the trial, to allow an amendment of the complaint, the party must show a clear case of unquestionable right. *ib*
3. Where, after the recovery of a judgment in a court of common pleas, an execution is issued to another county, and levied upon the defendant's property there, without the filing of a transcript or the docketing of the judgment in that county, the defect in the execution is amendable. *ib*
4. Where, in ejectment, the plaintiff proves title to a smaller quantity of land than he has claimed in his declaration, he is entitled to recover according to the proof; and the declaration may be amended accordingly. *Kellogg v. Kellogg*, 116

APPEAL.

1. To render the sureties in an appeal bond liable, execution must be issued against the appellant within thirty days after the rendition of the judgment in the appellate court. *For v. Ames*, 256
2. It is irregular to file an undertaking, given on taking an appeal, without the same having been proved or acknowledged, pursuant to the 120th rule. *Beach v. Southworth*, 173
3. A party appealing must serve upon his adversary copies of all the papers which he is required to file in order to perfect the appeal. *ib*
4. Accordingly held necessary to serve a copy of the certificate of a judge, obtained pursuant to section 299 of the code. *ib*
5. Notice must be given to the opposite party of the names and additions of the sureties to an undertaking given upon bringing an appeal. *ib*
6. Such notice must contain the names and additions of the sureties, specifying their calling or occupation, and, in the city, the number of the street where they reside. *ib*
7. An undertaking upon an appeal is of no validity or effect, unless it has been approved, in the first instance, by a judge of the court below. *ib*
8. But the want of an approval is such a defect as will not prejudice the rights of the party to whom, or for whose benefit, the undertaking has been taken; and it therefore comes within the provisions of the revised statutes relative to the sufficiency of bonds, and amending defects therein, and may be amended in that respect. *ib*
9. On appeals from orders made upon special motions, as distinguished from judgments, no security is required. *ib*

ASSAULT AND BATTERY.

1. The fact that a person prefers a criminal charge against another, before a justice of the peace, and is a witness upon the trial of the accused, and employs counsel to conduct the trial on the part of the people, will not render him liable, in an action for as-

sault and battery and false imprisonment, for the consequences of an erroneous conviction by the justice; where there is nothing to connect him with the unlawful imprisonment of the plaintiff. *Peckham v. Tomlinson*, 253

2. On an indictment for an assault and battery, the defendant may give evidence to show that he owned the premises on which the assault and battery were committed, and that he did the acts complained of, in defense of the possession of his said premises. *Harrington v. The People*, 607

3. And if the assault and battery was committed in resisting persons entering upon the premises to open and work a highway, the defendant may prove that the alleged highway was laid through his orchard of four years' growth, without his consent. *ib*

ASSESSMENT.

An assessment, laid by a municipal corporation, for the purpose of meeting the expenses of building a public sewer, which expenses are directed to be apportioned, and an assessment thereof to be made among the owners or occupants of the lands and premises benefited thereby, in proportion to the amount of such benefit which each shall be deemed to acquire by such improvement, is not within the scope of the legitimate and constitutional exercise of the taxing power, and is illegal and void. *The People, ex rel. Post, v. The Mayor, &c. of Brooklyn*, 209

See TAXATION.

ASSETS.

See EQUITY.

ASSIGNMENT.

See CREDITOR'S SUIT.
DEBTOR AND CREDITOR.
EQUITABLE ASSIGNMENT.
PROMISSORY NOTES, 8, 9.

ASSIGNOR AND ASSIGNEE.

See DEBTOR AND CREDITOR.
PROMISSORY NOTES, 6, 9.

ATTORNEY.

1. An attorney, under his general authority to collect a note, is authorized to receive a payment of part in money and the residue in a note for a short period, of a person of undoubted responsibility. *Livingston v. Radcliff*, 201
2. An attorney has no authority, as such, to release a witness, in the name of his client. *Bowne v. Hyde*, 392

See LIBEL, 1, 2, 3.

B

BASTARDS.

See PARENT AND CHILD.

BILLS OF EXCHANGE.

See EQUITABLE ASSIGNMENT.

BILL OF PARTICULARS.

See PRACTICE, 12.

BONA FIDE PURCHASER.

1. The lien of a judgment does not attach, in equity, upon the mere legal title to land, existing in the defendant, when the equitable title is in a third person. And if a purchaser under the judgment has notice of the equitable title, before his purchase, and the actual payment of the money, he cannot protect himself as a *bona fide* purchaser. *Averill v. Loucks*, 19
2. A person whose title to land, though regular, on paper, is obnoxious to the objection of having been obtained by fraud, can not shield his title by conveying the premises to a *bona fide* purchaser, and afterwards purchasing them back. *Per WELLS, J. Schutt v. Large*, 373
3. The title of a *bona fide* purchaser of premises for a valuable consideration, claiming to hold the same under a regular chain of subsequent recorded conveyances, will, under the operation of the recording acts, be preferred to the title of a person claiming the premises under and by virtue of a prior

unrecorded conveyance from the same common source of title. *ib*

4. The recording acts protect none but innocent and *bona fide* purchasers and holders of real estate. And none should be deemed *bona fide* purchasers who purchase with knowledge, or notice, of a defect in the title. *ib*

5. Parties who receive a note which has been improperly put in circulation, in payment of an existing debt, without parting with any value for it, at the time, or surrendering any securities, are not entitled to hold it, as against the rightful owner. *Spear v. Myers*, 445

BOND.

See APPEAL.

BOND AND WARRANT OF ATTORNEY.

See JUDGMENT, 4, 5, 6.

BROKER'S COMMISSIONS.

Under the statute of this state a broker is not entitled to charge more than one-half of one per cent for negotiating or procuring a loan, whatever may be the length of time for which the loan is made. *Broad v. Hoffman*, 177

C

CAPIAS AD RESPONDENDUM.

See SHERIFF, 2.

CASE.

1. The object of a case, under the code of procedure, of 1848, made by a party desiring a review upon the evidence appearing on the trial before the referee, is to enable the appellant to call in question the facts stated by the referee in his report. *Wilson v. Allen*, 542
2. It is analogous to the old practice of moving to set aside a report as being

against the weight of evidence. If the admissions in the pleadings, and the other evidence in the cause, warrant the finding of the facts as stated by the referee, in his report, it can not be set aside as being against evidence. *ib*

3. A defendant, after having failed to demur to the complaint, or to object to the evidence, or to except to the decision of the referee in giving judgment for the plaintiff, will be held to have waived his right to object to the sufficiency of the complaint. *Carley v. Wilkins*, 557
4. He can not raise the objection, upon the hearing of a case, brought in pursuance of the 223d section of the code of 1848, for the purpose of reviewing the decision of a referee upon the evidence appearing before him *ib*

CASES OVERRULED, &c.

1. The dictum of Savage, Ch. J. in *Connolly v. Peirce*, (7 Wend. 129,) that when a vendee does not tender a deed ready drawn he should call on the vendor and request the execution of a deed, and after waiting a reasonable time, call again to receive it, overruled. *Carpenter v. Brown*, 147
2. The decisions in *Cole v. Sackett*, (1 Hill, 516,) and *Waydell v. Luer*, (5 Id. 448,) considered and disapproved. *Livingston v. Radcliff*, 901
3. The decision in *Lipe v. Becker*, (1 Denio, 568,) relative to the time of issuing executions upon appeal from justices' courts, approved. *Fitz v. Ames*, 256

CERTIFICATE.

See EVIDENCE, 1.

CERTIORARI.

See APPEAL, 4.
HABEAS CORPUS, 4.

COMMITMENT.

See WARRANT.

COMPLAINT.

1. A defendant, after having failed to demur to the complaint, or to object to the evidence, or to except to the decision of the referee, in giving judgment for the plaintiff, will be held to have waived his right to object to the sufficiency of the complaint. *Carley v. Wilkins*, 557
2. Where a complaint alleged that on a certain day, and at a certain place, the defendant, by his promissory note in writing, for value received, promised to pay to the plaintiff or bearer, a specified sum; that he had not paid the same; but was indebted to the plaintiff therefor; *Held*, on demurrer, that this was sufficient; although there was no allegation that the defendant delivered the note, and the complaint did not state when the note was payable, nor whether the same was due, or not, nor that the plaintiff was the owner or holder of the note. *Peets v. Bratt*, 662

CONDITION PRECEDENT.

See COVENANT.

CONFESSIONS.

1. When a party relies upon the confessions of his adversary, for matter of charge, the latter is entitled to all that was said, at the same time, on the same subject, by way of discharge. *Dorlon v. Douglass*, 451
2. The court and jury may give credit to what charges the party, and disbelieve matter said at the same time, in avoidance, if the latter is improbable in itself, or is shaken by the other proofs in the cause. *ib*
3. If the matter of avoidance relates to another subject, not inquired about by the examining party, although relevant to the matter in issue, it is not admissible. *ib*

See DECLARATIONS.

CONSTITUTIONAL LAW.

1. It is a fundamental principle, in our government and laws, that individ-

uals are protected in the enjoyment of their property, except so far as it may be taken in one of two ways, viz. as a public tax, upon principles of just equality; or for public use, with a just compensation, ascertained according to the provisions of the constitution. *Per BARCULO, J. The People, ex rel. Post, v. Mayor, &c. of Brooklyn*, 209

2. As money is property, the collection of every tax or assessment is taking property, in some mode; and, in order to be legal, must be referable to one of the two modes above mentioned. *Per BARCULO, J. ib*
3. An assessment laid by a municipal corporation for the purpose of meeting the expenses of building a public sewer, which expenses are directed to be apportioned, and an assessment thereof to be made among the owners or occupants of the lands and premises benefited thereby, in proportion to the amount of such benefit which each shall be deemed to acquire by such improvement, is not within the scope of the legitimate and constitutional exercise of the taxing power, and is illegal and void. *ib*
4. The compensation required by the constitution to be paid whenever private property is taken for public use, does not consist of real or imaginary benefits, but can only be made in money. *ib*
5. Public improvements in cities and villages can only be paid for by a regular tax, or by voluntary contributions. *ib*

See TAXATION.

CONTRIBUTION.

The owners of a ship involuntarily stranded cannot claim a contribution from the owners of the cargo, for the destruction of the masts and rigging, by the master, in order to save the ship and cargo, and the lives of the crew, as general average; where, although the cargo is saved, the ship is finally lost, totally. *Marshall v. Garner*, 394

CORPORATION.

1. Secondary and even presumptive proof is admissible to fix the liability

of a corporation, and to prove its corporate acts. *Trustees of St. Mary's Church v. Cagger*, 576

2. The omission of a corporation to make a record of its own doings, will not be allowed to prejudice the rights of a party who has, in good faith, relied upon an official assurance of its corporate act. *ib*
3. Accordingly, where resolutions were adopted by the trustees of a religious society acknowledging the justness of a claim made by the plaintiff against the corporation, fixing the amount thereof, and agreeing to pay the same within a specified time, were duly certified by the secretary of the board of trustees, and transmitted to the plaintiff, who thereupon assented to the proposition contained in the resolutions, and agreed to accept the sum offered by the trustees; *Held* that an action would lie against the corporation, notwithstanding it had omitted to make a record of the vote of its board of trustees upon the resolutions. *ib*
4. *Held also*, that the plaintiff could recover, upon the promise contained in the resolutions, under a count upon an account stated. *ib*

COSTS.

1. Where two persons sue as executors, and fail in the action, one of them can not be charged with costs, on the ground that he was beneficially interested in the recovery, in right of his wife. *Finley v. Jones*, 229
2. The fact that executors or administrators have never advertised for the presenting of claims, does not entitle a creditor to recover costs in a suit brought against them. Costs can only be recovered where the claim has been presented and the payment has been unreasonably resisted or neglected, or where there has been a refusal to refer a disputed claim. *Van Vleck v. Burroughs*, 341

COUNSEL.

Counsel will be excused from producing deeds in their possession and which they have received in their character

as counsel; and from testifying as to their contents. *Kellogg v. Kellogg*, 116

COVENANT.

1. G., in consideration of \$950, to be paid by J. as follows: \$200 on the 1st of April, 1846; \$200 on the 1st of April, 1847; and the remainder in two equal annual payments thereafter, agreed to sell to J. a certain piece of land, and covenanted to give possession on the 1st of November, 1845, and to convey by deed on the first of May, 1846, "if the above conditions are complied with." G. gave possession of the premises, and J. paid the first installment. In an action by G. to recover the \$200 due on the 1st of April, 1847, J. pleaded that he was ready and willing to accept a deed, and requested G. to execute it but that he did not, on the 1st of May, 1846, or at any time afterwards, execute and deliver to J. a good and sufficient deed, but neglected and refused to do so; *Held*, on demurrer, that a tender of a deed by G. was not a condition precedent to the payment of the 2d installment; and that G. was entitled to judgment. *Grant v. Johnson*, 337
2. By a lease dated the 4th of March, the plaintiffs demised to the defendants, a house and store for one year from the first of May then next; the store to be fitted up at the expense of the plaintiffs, and completed and ready for occupancy by the said 1st day of May, and the Croton water to be introduced into the house and store at the plaintiffs' expense; but no rent was to be charged for the store previous to the 1st of May. By a counter-part of the lease the store was to be fitted up by the owners for a genteel grocery, and to be ready for occupancy by the 1st of April, and the house was to be completed by the 1st of May. In an action of covenant for the rent; *Held* that the covenants on the part of the lessors, contained in the instruments, were not conditions precedent. *McCullough v. Cox*, 386
3. Where mutual covenants go to the whole consideration, on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part of the consideration, then a remedy lies on the covenant, to recover damages for

a breach of it, but it is not a condition precedent. *ib*

See DEED, 8, 9, 10, 11, 12.

COVENANT, ACTION OF.

1. In an action of covenant for rent, the defendant can not, by a plea in bar, recoup his damage for breaches of covenant by the lessor. *McCullough v. Cox*, 386

CREDITOR'S SUIT.

1. In 1839 E. B. gave a bond and mortgage to D. for \$2625, which were afterwards assigned to W. In 1842 W. foreclosed the mortgage, in chancery. On the sale of the premises there was a deficiency of \$2387; for which sum the decree was docketed, in August, 1842. An execution was issued, and returned unsatisfied. On the 17th of May, 1843, W. assigned the decree to the plaintiff. On the 18th of Sept. 1840, E. B. became entitled to have conveyed to him, in fee, a lot of land by M. and C., in pursuance of a previous contract for the purchase of the same; he having paid to M. and C. the whole of the consideration money. By the direction of E. B., on the 26th of May, 1841, M. and C. conveyed the lot of land to trustees in trust for N. B., the wife of E. B. In August, 1843, E. B. died, and his wife in June, 1843. On the 7th of May, 1841, the plaintiff in this suit and W. K. W. recovered a judgment against E. B., upon which a creditor's bill was filed, in September, 1841, and in October, 1841, a receiver was appointed. In February, 1842 E. B., in obedience to an order of the court, made a general assignment to the receiver. On the 6th of November, 1841, the receiver sold to the defendant H., at public auction, all the right, title and interest which E. B. had in the lot in question on the 7th of May, 1841, or at any time afterwards, and executed to him a deed therefor. On a bill by the plaintiff, against H., the administrators of E. B., the heirs at law of N. B., his wife, and the trustees named in the deed of trust, to obtain satisfaction of the decree obtained by W. against E. B., and assigned to the plaintiff, out of the lot in question, in which bill it was alleged that a trust resulted in

favor of the plaintiff as a creditor of E. B., from the deed from M. and C. to the trustees for the wife of E. B., on the ground that the consideration money was paid by E. B., and that the deed in trust was made with the intent to defraud the creditors of E. B., who was, at the time and afterwards, insolvent; *Held*, 1. That the conveyance by M. and C. to trustees in trust for Mrs. B., if valid, came within the 52d section of the article of the revised statutes relative to uses and trusts. That a trust, under the provisions of that section, resulted to E. B. in favor of his existing creditors, which was an equitable interest in the premises in question, capable of being reached by a creditor's bill. 2. That upon this equitable interest the plaintiff and W. obtained a specific lien by the filing of their creditor's bill in Sept. 1841; and that it was transferred to the receiver by the assignment of E. B., and passed to the defendant H. on the sale to him, by the receiver, of E. B.'s interest in the lot in question. 3. That the sale and conveyance by the receiver, to H. vested in him the whole equitable estate in the land, and authorized him to compel the heirs at law of Mrs. B. to convey to him the legal title. 4. That it being alleged in the bill, and admitted by the defendants, that the deed of trust in favor of Mrs. B. was made with the intent to defraud the creditors of E. B., such deed was absolutely void, not only as to the antecedent but also as to the subsequent creditors of E. B.; and was to be regarded as if it had never existed; at least, as to those creditors who should elect to impeach it. 5. That the deed of trust being out of the way, E. B.'s interest in the premises in question was an equitable interest, derived under his contract of purchase with M. and C. which equitable interest was reached by the creditor's bill of the plaintiff and W. against E. B., and was transferred to the receiver by the assignment of E. B., and sold and conveyed by the receiver to the defendant H.; who had a right to call upon M. and C. to convey to him the legal title. 6. That the right of H. to the premises in question was paramount to that of the plaintiff, and that under the deed from the receiver he was entitled to hold such premises. *Watson v. Le Row*, 481

2. The court of chancery has no power, upon a creditor's bill, to order the real

estate of a judgment debtor to be sold to satisfy the judgment. *The Chautauque County Bank v. White*, 589

3. Nor will an assignment of all his property, real and personal, to a receiver, executed by the judgment debtor under and in obedience to an order of the court, vest the legal title to the real estate in the receiver, so as to authorize the court to direct him to sell such real estate and apply the proceeds to the payment of creditors having liens thereon. *ib*
4. Such an assignment will not so effectually divest the judgment debtor of his title to the real estate as to prevent a judgment subsequently recovered against him from becoming a lien thereon. *ib*
5. And the purchaser at a sale under such judgment will acquire a legal title to the real estate of the debtor; notwithstanding a sale of such property by the receiver in the creditor's suit, made in pursuance of an order of the court. *ib*
6. If the purchaser at the receiver's sale has received a conveyance of the premises, the person purchasing the property at the sale under the judgment has a right to the aid of the court of chancery to remove the cloud cast upon his title by the conveyance from the receiver. *ib*

See RECEIVER.

D

DAMAGES.

1. In an action by one party to an executory contract for work and labor, against the other, to recover the damages sustained by the plaintiffs in consequence of the suspension of the work by the defendants, the market price or fair value of the work agreed to be performed by the plaintiffs, on the day of the breach, is to govern in the assessment of damages. *The New-York and Harlem Railroad Company v. Story*, 419
2. The difference between the price which the plaintiffs were to receive from the defendants and the price which they were to pay their sub-con-

tractors for doing the work, is not the true measure of damages. *ib*

3. The damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not by the market price of labor and materials at the time fixed for full performance. *ib*
4. In an action by a lessee, against the lessor, to recover damages for a refusal to give possession of the demised premises, the plaintiff can not, for the purpose of showing the amount of damages sustained, give evidence of an advantageous contract for the assignment of the lease, or of an offer to purchase it by another person. *Lawrence v. Wardwell*, 423
5. Nor is such evidence admissible for the purpose of showing the value of the lease. *ib*
6. The amount paid by the plaintiff to workmen whom he was obliged to discharge in consequence of not being able to get possession of the premises at the time agreed upon, is a proper item of damage, in such an action, if specially claimed in the declaration. *ib*

See INDEMNITY.

VENDOR AND PURCHASER, 10, 13, 16, 17.

DEBTOR AND CREDITOR.

1. Discharge of debtor.

1. Where one of several makers of a note makes an arrangement with the other makers, or some of them, by which provision is made for the payment of such note, and the means are put into his hands for that purpose, and in consequence thereof he takes it up, paying a part of the amount in cash and giving his individual note for the balance, which the holder accepts in payment of the first note, and thereupon gives up the original note, the consideration is clear and sufficient, and the makers of the original note are thereby discharged. *Livingston v. Radcliff*, 201
- 2: Where the circumstances of the transaction show that a debtor, discharged by the acceptance of another security, has, by reason of the arrangement, put himself into a position where he may, or must, be pre-

judiced if held liable for the debt, this constitutes a legal consideration for the creditor's discharging him. *ib*

2. Assignment for the benefit of creditors.

3. An assignment, executed by a man in embarrassed or insolvent circumstances, of his property, in trust for the benefit of creditors, is valid if it unconditionally and absolutely devotes the whole of the assigned property to the payment of his debts; provided it be made without any intent to hinder, delay, or defraud his creditors. *Browning v. Hart*, 91

4. And if such assignment is valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it. *ib*

5. Although the appointment of the assignor as his agent, by the assignee, to collect the choses in action assigned, is to be regarded with suspicion, yet that circumstance alone, will not afford sufficient evidence of an original intent on the part of the assignor and assignee, or of either of them, to defraud creditors. *ib*

6. The right of creditors to set aside a fraudulent sale and transfer of his property made by a debtor, will not be taken away by a subsequent voluntary assignment made by such debtor of his property and effects to a trustee for the benefit of certain preferred creditors. *ib*

7. C. M. P., a debtor in failing circumstances, made a sweeping sale and transfer of all his property, real and personal, to his brother G. P. P., a young man without family, experience, or property resources, who was in his employment as clerk, for the sum of \$20,000 payable in one year with interest, taking from him his individual notes for that amount, not endorsed, guaranteed or secured. On the same day, C. M. P. made an assignment of those notes to B. in trust for the benefit of his creditors, giving preferences; *Held* that the sale from C. M. P. to his brother, and the assignment of the securities to B. were to be regarded as one transaction; and that the circumstances afforded sufficient evidence of a fraudulent intent, to justify an injunction and receiver. *Litchfield v. Pelton*, 187

8. An assignment for the benefit of creditors, which substantially reserves to

the assignors the right to give future preferences, is fraudulent and void as against the creditors of the assignors who have not assented thereto. *Averill v. Loucks*, 470

9. Accordingly, where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto, according to the priority of the several schedules, and provided that such schedules should be made within 60 days, and be annexed to, and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein; the preparation of such schedules being left entirely to the discretion of the assignors; and it appeared that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time; *Held* that the assignment was fraudulent and void. *ib*

10. The assignment must itself fix and determine the rights of the creditors in the assigned property, and not reserve to the assignors the power of subsequently doing so. *ib*

11. The fact that the assignment requires that the power reserved to the assignors shall be exercised within a certain specified time does not alter the principle. *ib*

12. Even if the schedules are prepared and annexed within the time prescribed by the assignment, this will not render the assignment valid from the time the schedules are annexed. *ib*

13. The assignment, if fraudulent and void when executed and delivered, will not be rendered operative and valid by any subsequent act of the assignor. *ib*

14. Assignees acting under a void assignment, will not be held accountable for that part of the proceeds of the assigned property paid over by them to the preferred creditors, in pursuance of the assignment, before any other creditors have obtained a lien upon the assigned property. *ib*

DECLARATIONS.

1. In an action of replevin against a sheriff for the act of his deputy, it is sufficient for the plaintiff to show that the deputy was a deputy of the defendant, and that he acted *colore officii*, in order to make his declarations in relation to his official acts, admissible in evidence against the sheriff. *Stewart v. Wells*, 79
2. The declarations of a deputy sheriff, made within the scope of his authority and while the process is in his hands and in the course of execution, are to be taken as part of the *res gesta*, and bind his principal. *ib*
3. Proof of a person's being deputy sheriff, and of his advertising property for sale under an execution, as such, is sufficient to authorize evidence of his declarations, without proving the issuing and delivery of an execution to him. *ib*
4. The confessions and declarations of parties are always received with distrust, and should be closely scrutinized. *Per ALLEN, J. Rathbun v. Rathbun*, 98

DECREE.

1. Money paid by a debtor, to his creditor, to be applied on a bond and mortgage, and which the creditor omits thus to apply, but obtains a decree in a foreclosure suit, for the whole amount, cannot be recovered back. The proper remedy in such a case is, a motion to open the decree, to enable the defendant to prove his payments, before the referee. *Eggleston v. Knickerbacker*, 458
2. While the decree remains in force it is conclusive upon the parties, that the amount therein expressed is the true sum due. *ib*
ut

DEDICATION TO THE PUBLIC.

1. The right to float logs in a stream, for two or three weeks of the year, during the spring freshets, in such a manner as to endanger and seriously injure the dams and factories and mills thereon, can not be made the subject of a dedication to the public;

such a right not being, in any sense, a public right, which can, from the nature of the case, be enjoyed by the public at large. *Munson v. Hungerford*, 265

2. User, alone, is not enough to establish the fact of a dedication to the public; except in the case of streets and public ways. *ib*

DEED.

1. Where a deed, executed by commissioners of loans, which was required by statute to be subscribed in the presence of two witnesses, was witnessed by but one, but was duly acknowledged by the grantors, at the time; *Held* that it was a good execution. *The Commissioners of the U. S. Deposit Fund v. Chase*, 37
2. The delivery of a deed to the county clerk, for record, and for the use of the grantee, is a perfect delivery by the grantor; and upon an acceptance of such deed by the grantee, it takes effect from the time of such delivery. *Rathbun v. Rathbun*, 98
3. Parol evidence will not be received for the purpose of engrafting upon a deed any condition, limitation, or reservation inconsistent with its terms. *ib*
4. Accordingly, *held* that a trust could not be established between the grantor and grantee in a deed absolute on its face, by evidence of a parol message sent to the grantee, by the grantor, after the delivery of the deed, informing him of such delivery and expressing a hope that the grantee would take the property and sell it to pay the grantor's debts, and that if there was any balance left, the grantee would let him have it in money, or lands in some other place; such message not being simultaneous with the delivery of the deed, and a part of the same transaction, and the messenger not being the agent of the grantor, and no assent or dissent on the part of the grantee to the terms and conditions mentioned being required. *ib*
5. Where a deed contains an express declaration that the conveyance is for the use of the grantee, and it is made for a good and valuable consideration,

- there can be no implied or resulting use or trust in favor of the grantor. *ib*
6. As a general rule, grants or reservations, in conveyances of water privileges, should be deemed absolute rather than limited to the particular objects specified; unless it clearly appears from the conveyance that the contrary was intended; such a construction being most favorable to the interests of the community. *Olmsted v. Loomis*, 152
7. Accordingly, although in a grant of a water-power the grantor reserved sufficient water to carry a forge and two blacksmith's bellows, yet it appearing that those objects were mentioned, not for the purpose of prescribing the use to which the water reserved should be applied, but simply as a measure of quantity; *Held*, that the grantor, and those claiming under him, had a right to apply the reserved water to another purpose, viz. the propelling of a paper mill; provided a greater quantity was not used than would be requisite for the objects particularly specified. *ib*
8. If a deed conveys the possession of land, that is estate enough to carry along with it the covenants of warranty and for quiet enjoyment. *Fowler v. Poling*, 165
9. To authorize a recovery by a grantee upon the covenants of warranty, an eviction by legal process is not necessary. He may surrender possession to the rightful owner; and that will be a sufficient ouster to entitle him to his action. *ib*
10. A difference exists between an eviction under a covenant for quiet enjoyment, and one under a covenant of warranty. The former covenant relates only to the possession, and the eviction is merely required to be of lawful right; while the latter relates to the title, and the eviction must be not only by lawful right but by paramount title. *Per EDMONDS, J.* *ib*
11. To entitle a grantee to recover for a breach of the covenants of warranty and for quiet enjoyment, there must be an actual disturbance of the possession. *ib*
12. Where the covenantee is actually out of possession, either by due process of law, or by an entry of the rightful owner, or by a surrender to one having a paramount title, there is an eviction; the covenant is broken; and an action will lie. *ib*
13. What constitutes a valid delivery of a deed. *Roosevelt v. Carow*, 190
14. Where a deed from a father, to trustees, in trust for his daughter, was signed and sealed by the grantor in the presence of witnesses, but the attesting clause did not state that it was delivered; and the grantor retained the same in his possession nearly four years after its execution, and until the time of his death, without disclosing its existence either to the trustees or to his daughter, the cestui que trust; in the mean time treating the property as his own, and altering his will so as to increase a previous devise to his daughter to an amount nearly double the value of the property conveyed; and after his death the deed was found in a bureau belonging to the grantor, among his clothes, and was then proved by one of the subscribing witnesses, and recorded; *Held* that such deed was void and inoperative as a deed of bargain and sale, for want of a valid delivery. *ib*
15. *Held also*, that such deed was not valid or operative as a voluntary settlement. *ib*
16. A voluntary settlement, fairly made, is always binding in equity, on the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed. And even if he retains it, the weight of authority is in favor of its validity, unless there be circumstances besides the mere fact of his retaining it, to show that it was not intended to be absolute. *Per EDMONDS, J.* *ib*
17. The surrender or cancelling of a deed, after delivery, will not reinvest the grantor with the title to the land conveyed. *Schutt v. Large*, 373
18. The recording of a deed is constructive notice to all the world, of its existence. There is no difference between the effect of such notice, on a question of superiority of title, and an

actual notice, so far as respects the person receiving such actual notice. *ib*

See CREDITOR'S SUIT.
ESTOPPEL.
RECORDING ACTS.

DEMAND.

See MORTGAGE, 7, 8.
TROVER, 2.

DIVORCE.

What is sufficient evidence of adultery, in a suit for a divorce. *Van Epps v. Van Epps*, 320

E

EJECTMENT.

1. To recover in ejectment, under a purchase of the premises at a sheriff's sale on a judgment against the defendant, it is sufficient for the plaintiff to show the defendant in possession at the time of the recovery of the judgment against him, and a continued possession in him from that time to the time of the commencement of the suit; and that the plaintiff acquired the title of the defendant, under the sheriff's sale. *Kellogg v. Kellogg*, 116

2. Where a contract for the sale of land does not give to the purchaser any right of entry, but he is in possession of the premises, at the time of bringing an ejectment against him, his possession will not be assumed to be under his contract for the purchase, but will be referred to some other right or contract. *ib*

3. Where, in ejectment, the plaintiff proves title to a smaller quantity of land than he has claimed in his declaration, he is entitled to recover according to the proof; and the declaration may be amended accordingly. *ib*

4. In ejectment for lands held in common, it is not necessary that all the tenants in common should unite in the action; except when it is brought as a substitute for a writ of right. *ib*

EQUITABLE ASSIGNMENT.

1. Where a fund was raised by T., by a loan from G., and was placed in the hands of B. to answer certain specified purposes, among which was the payment of a certain sum to S., and T. thereupon drew a draft upon B., in favor of S., in these words, "Please pay to N. W. S. or order, \$7000 out of the money you receive from F. G. for me, in the following manner, \$500 when," &c.; and the draft was accepted by B. as follows, "Accepted, payable when in funds, under the contract;" *Held*, that the draft was payable out of the particular fund mentioned, which was to be regarded as equitably appropriated for that purpose. *Vreeland v. Blunt*, 182

2. *Held also*, that after the recovery of a judgment by S. against T., for the amount due from the latter to the former, on the draft, and the return of an execution unsatisfied, a bill would lie against T. and B. to compel B. to apply so much of the fund in his hands as should be necessary to satisfy such judgment, with interest and costs. *ib*

EQUITABLE CONVERSION.

See HUSBAND AND WIFE, 9.

EQUITY.

Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims, and charges existing upon the property, according to their priorities. *Averill v. Loucks*, 470

See JURISDICTION, 1, 2, 3, 4.

ESCAPE.

See SHERIFF, 1.

ESTOPPEL.

1. The grantor in a deed containing covenants of warranty is estopped from claiming a resulting trust in the premises conveyed, for his own bene-

fit. Even if he might so far explain his own deed as to show a non-payment of the purchase money, he can not, by parol evidence, do away with his covenants of warranty. *Rathbun v. Rathbun*, 98

2. The verdict of a jury, upon title, in trespass, not only operates as a bar to the future recovery of damages for a trespass, founded upon the same injury, but it operates also as an estoppel to any action for an injury to the same supposed right of possession. *Per WILLARD, J. Dunckle v. Wiles*, 515

3. As the former judgment can not be pleaded by way of estoppel, in an ejectment suit, the defendant is entitled to avail himself of it as evidence under the general issue. And when evidence of a former recovery is thus introduced, it is as conclusive as though the matter had been specially pleaded by way of estoppel. *Per WILLARD, J.* *ib*

4. A person who, being himself the owner of property, stands by and sees another sell it as his own, without objection, will not be allowed afterwards to assert his title. His silence, when, in good conscience, he ought to speak, shall close his mouth when he would speak. *The Chautauque Co. Bank v. White*, 589

5. Accordingly, where a person, at a receiver's sale of real estate, represented, or induced the receiver to represent, that the property was encumbered greatly beyond its utmost value, and that he who purchased would acquire only the right to the use of the property until a legal title could be perfected under the incumbrances; by means of which representations all competition was prevented, and such person purchased the property at a merely nominal price; *Held* that he was concluded by the representations made by him, and estopped from denying that the judgments mentioned at the receiver's sale were then existing liens upon the land purchased by him. *ib*

EVICITION.

See DEED, 9, 10, 12.

EVIDENCE.

1. Of the execution of a will.

1. The certificate of a surrogate, of the proving of a will before him by one of the subscribing witnesses, is not proof of the execution of the will, so as to authorize the will to be given in evidence. *Staring v. Bowen*, 109

2. Ancient wills.

2. To entitle a will to be read in evidence as an ancient will, without proof, the possession must have been in accordance with the will for thirty years. *ib*

3. Mere efflux of time will not authorize a will of thirty years' standing to be given in evidence without proof. There must have been possession under it. *ib*

4. Where there are no circumstances shown to establish the genuineness of a will, and the evidence is that the premises have been occupied by some one from the death of the testator; but the plaintiff is unable to show that such possession was in pursuance of the provisions of the will, for the period of thirty years; and there is better evidence of the execution of the will, within reach of the plaintiff, viz. one of the subscribing witnesses residing within the state, such will can not be received in evidence as an ancient deed, without proof. *ib*

5. Where possession is relied upon, instead of the ordinary and usual proof of the execution of a will, it is not sufficient to exclude it that one of the witnesses to the will is still living. *ib*

6. But the possession which will excuse the production of the subscribing witnesses to a will, must be for the full term of thirty years, since the death of the testator, if not to the time of the commencement of the action. *ib*

7. Although a will of more than thirty years' standing may, in the discretion of the judge, be permitted to be read as an ancient will, before proof of an accompanying possession, still it is a question as to the order of proof, in the discretion of the court, whether the possession shall be first proved or the will first given in evidence, in order that the court may be able to say whether the possession has been in

- accordance with the provisions of the will. *ib*
3. *Parol evidence, when received.*
8. The grantor in a deed containing covenants of warranty is estopped from claiming a resulting trust in the premises conveyed, for his own benefit. Even if he might so far explain his own deed as to show a non-payment of the purchase money, he can not, by parol evidence, do away with his covenants of warranty. *Ralhbun v. Ralhbun*, 98
9. Parol evidence will not be received for the purpose of engrafting upon a deed, any condition, limitation, or reservation inconsistent with its terms. *ib*
10. Under the statute of frauds parol evidence is inadmissible to establish a trust respecting real estate. And the doctrine of part performance will not be applied, and held to take such a trust out of the statute. *ib*
11. Parol evidence is inadmissible to contradict or explain a written agreement. *Egleson v. Knickerbacker*, 458
12. A receipt is so far an exception to this rule, that it may be explained as to the consideration part, when the explanation is not contradictory to, but consistent with, the instrument. *ib*
13. A receipt, absolute in its terms, can not be shown, by parol evidence, to be upon condition; except on a proceeding to reform the instrument, for fraud or mistake. *ib*
14. Parol evidence is inadmissible for the purpose of divesting the title of the owners of real estate. Accordingly, where a particular place, claimed to be a public highway, had never been opened, or worked, or used, as a highway, it was held that it could not be proved a highway, by parol. *Harrington v. The People*, 607
15. Although a party may offer evidence to explain, he can not introduce it for the purpose of adding to or contradicting a record. *Noyes v. Buller*, 613
16. Upon an application to the supreme court, for relief against a judgment entered up by confession, on a bond and warrant of attorney, the court will receive parol evidence in relation to the extent and object of the bond and warrant, and the consideration thereof. *Averill v. Loucks*, 19
4. *Secondary evidence.*
17. Secondary and even presumptive proof is admissible to fix the liability of a corporation, and to prove its corporate acts. *Trustees of St. Mary's Church v. Cagger*, 576
5. *Judgment records.*
18. If the record of an inferior court or tribunal omits to state facts necessary to give it jurisdiction, such record, without proof of the facts *aliunde*, is not evidence, for any purpose. *Harrington v. The People*, 607
19. A record is never conclusive as to a recital or statement of jurisdictional facts. The defendant is always at liberty, when a suit is brought, here, on a judgment of a court of another state, to show a want of jurisdiction, notwithstanding the record avers the contrary. *Noyes v. Buller*, 613
20. But the record of a judgment recovered in another state, which states facts giving the court jurisdiction, will be received here as *prima facie* evidence of such facts. The defendant, however, may contradict and disprove them. *ib*
21. Accordingly he may show that the court had not jurisdiction of the subject matter of the suit, or of his person, by the personal service of process, or by his appearance in the suit either in person or by attorney. *ib*
22. No statements, in a record, will conclude the parties as to any jurisdictional fact. But where the record of a court of a sister state, on its face, shows that the court had jurisdiction of the subject matter of the suit, and of the person of the defendant, such record is conclusive as to every other fact contained in it. *ib*
23. If such record alleges that at a specified term of the court the parties appeared, and that the action was continued until a subsequent term, when judgment was rendered in favor of the plaintiff, this is sufficient, *prima facie*, to show that such court acquired jurisdiction of the person of the defendant. *ib*

24. Where such a record does not show that the court acquired jurisdiction of the person of the defendant, the plaintiff in an action in this state founded upon the judgment can not prove, by parol evidence, in aid of the record, that the court which rendered the judgment did obtain jurisdiction of the person of the defendant, either by personal service of process, or by his appearance in person or by attorney. *ib*
25. If, in an action of trespass *quare clausum fregit*, but one close is set out and described in the declaration, and judgment passes against the defendant upon the single plea of *liberum tenementum*, the record is *prima facie* evidence of title in the plaintiff. *Dunckle v. Wiles*, 515
26. As the judgment in such suit can not be pleaded by way of estoppel, in an ejectment suit subsequently brought by the plaintiff therein, the defendant is entitled to avail himself of it as evidence under the general issue. And when evidence of a former recovery is thus introduced, it is as conclusive as though the matter had been specially pleaded by way of estoppel. *Per WILLARD, J.* *ib*
27. The record must show that the same matter might have come in question on the former trial, and then the fact that it did come in question, may be shown by proof *altrunde*. *ib*
6. *Copy of answer.*
28. A copy of an answer in chancery, served on the plaintiff's solicitor as such, can not be given in evidence in a subsequent suit between the same parties, upon a witness testifying that he has compared only a portion of said copy with the original on file, leaving the remainder not compared. *Kellogg v. Kellogg*, 116
29. As a copy of the answer on file, such copy is to be proved in the same manner as other transcripts, viz. by a witness who has compared the copy, line for line, with the original, or who has examined the copy while another person read the original. *ib*
7. *Must be within the issue.*
30. No evidence is required, to establish a fact distinctly pleaded and not replied to; nor is evidence contradicting it admissible. *Walrod v. Bennett*, 144
31. If evidence contradicting such an averment is given, it will be not within the issue, and therefore unavailing; unless the defendant waives the objection. *ib*
32. Under a plea affirming that the debt is barred by the statute of limitations, and a replication denying that fact, any evidence tending to show that the debt is not subject to the operation of the statute is pertinent to the issue. *Carshore v. Huyck*, 583
33. Proof of a new promise is therefore not only pertinent, but conclusive, upon that issue in favor of the plaintiff. *ib*
- See DIVORCE.
HIGHWAYS, 2.
JUSTICE'S DOCKET.
PRACTICE, 8, 9, 10, 14.
SHERIFF, 1.
- ### EXECUTION.
1. Under a naked contract of purchase, which is silent on the subject of possession, the purchaser acquires no right to the possession. But if he enters in pursuance of a parol license from the vendor, the possession thus acquired is an interest in the land, distinct from the interest acquired under the contract, and is subject to sale on execution. *Kellogg v. Kellogg*, 116
2. The possession of a vendee in possession under a contract of purchase may be likened to that of a tenant, for many purposes, yet his estate is *sui generis*, and does not come within the act exempting estates at will or by sufferance from sale on execution. *ib*
3. The 24th section of the act of 1840 concerning costs and fees, which provides that executions shall not be issued until thirty days after judgment, does not apply to executions issued on judgments rendered upon appeal. *Fox v. Ames*, 256
4. The decision in *Lipe v. Becker*, (1 Denio, 568,) upon this point, approved. *ib*
5. A *ca. sa.* is an execution, within the meaning of the act of 1843, amending the revised statutes so as to require executions to be issued within thirty days after the time when by law such

execution could be issued, and the 292d section of the act concerning courts held by justices of the peace. *ib*

6. Money paid in satisfaction of a valid judgment, which stands unreversed, can not be recovered back, on the ground that the execution issued upon the judgment, by virtue of which the defendant's goods were seized, was irregularly issued; both parties at the time supposing it to be regular. *Roth v. Schloss*, 308

7. After a judgment has been recovered in a court of common pleas, and an execution issued to another county and levied upon the defendant's property there, without the filing of a transcript or the docketing of the judgment in that county, the court in which the judgment was recovered has power to order a transcript to be filed, and the judgment to be docketed, in the county where the defendant's property was seized, *nunc pro tunc*. *ib*

8. Such a defect in an execution is amendable, and the execution will stand good, and afford a justification to the sheriff, until it is set aside by a court of competent jurisdiction. *ib*

See JUDGMENT, 6.

EXECUTORS AND ADMINISTRATORS.

1. When a contract is made with an executor or administrator, personally, after the death of the testator or intestate, or where money is received by the person sued after such death, the executor or administrator may sue either in his own name or as executor or administrator. *Merritt v. Seaman*, 330
2. In a suit brought against the defendant as executrix, she pleaded in bar, *ne umques executrix*; the plaintiff replied that the defendant had been, and was, executrix, and that she had administered divers goods and chattels of the deceased, as such executrix, "to wit: at M. in the state of F.", that is to say, at the city and in the county of New-York." *Held*, on demurrer, that the replication was bad; and that the defendant could not be sued in a court of law in this state, by

reason of her being a foreign executrix, or by reason of her having administered, in another state, any of the goods and chattels of the deceased. *Vermilya v. Beatty*, 439

See COSTS.

SET-OFF, 3, 4, 5, 6.
SURROGATE, 1, 3.

EXEMPTION ACT.

See STATUTES, 2, 3.

EXTINGUISHMENT.

Where a mortgage is given as collateral security for notes and drafts, and not in satisfaction thereof, the latter will not be extinguished by the former. *Averill v. Loucks*, 470

F

FALSE IMPRISONMENT.

See ASSAULT AND BATTERY

FIRE.

See INSURANCE.

FORECLOSURE SUIT.

1. Where, during the pendency of a foreclosure suit, a person takes a lease of the mortgaged premises, from the mortgagor, and gives to him a chattel mortgage to secure the rent, and the chattel mortgage is subsequently assigned to a third person, the assignee takes the assignment subject to all the equities and legal infirmities which can attach to it by reason of the final decree in the foreclosure suit, although he is not a party to such suit. But he is not bound by any proceeding to compel the tenant to atorn to a receiver and pay rent to him, unless he has notice of the application, and an opportunity to be heard. *Zeiler v. Bowman*, 133
2. So far as the claim of such assignee, under his chattel mortgage, is con-

cerned, he stands in the place of the landlord and lessor, and is entitled to be heard on an application for an order to appoint a receiver, and directing the tenant to attorn and pay rent to such receiver. *ib*

3. A court of equity will examine the equities of the several claimants of the rents, issues and profits of mortgaged premises during the pendency of proceedings to foreclose the mortgage; without reference to the time of the accruing of the equities, and whether they accrued *pendente lite*, or before the commencement of the proceedings. *Per ALLEN, J.* *ib*

4. Where a mortgagee, who has neglected to take a specific pledge of the rents and profits of the mortgaged premises, files a bill to foreclose the mortgage, and obtains an order upon the tenant to attorn to a receiver appointed in the foreclosure suit, all that the mortgagee is entitled to is the immediate possession of the premises, as security for the payment of his debt. *ib*

5. If the tenant has gone into possession *pendente lite*, the mortgagee is entitled to an order that he yield possession, or pay rent from that time to a receiver. But he has no right, in any event, to an order—especially as against the equitable rights of others—which will in effect vest him with the possession, *nunc pro tunc*, as of a time anterior to the application. *ib*

FRAUD.

1. A person whose title to land, though regular, on paper, is obnoxious to the objection of having been obtained by fraud, cannot shield his title by conveying the premises to a bona fide purchaser, and afterwards purchasing them back. *Schull v. Large*, 373
2. A voluntary purchase by a husband, in the name of his wife, will be fraudulent as against antecedent creditors, in like manner as if the settlement was of property actually vested in the husband. *Watson v. Le Row*, 481
3. H., who was largely in debt, and embarrassed in his business, and unable to pay his debts, sold his stock of goods in his store to M. for \$1500,

and received from him two notes for \$400 each, payable in one and two years after date, and allowed the residue of the purchase money to be retained by M. in payment of a debt of \$63 which H. owed him, and to secure him for his liabilities as indorser or surety for the then late firm of M. & H., but which liabilities were never paid by M. It was known to M. at the time of the purchase, that H. had been prosecuted and was insolvent. Held that such sale and purchase were fraudulent and void as against creditors. *Browning v. Hart*, 91

See DEBTOR AND CREDITOR, 3 to 14.
INJUNCTION, 2, 3.

FRAUDS, STATUTE OF.

See EVIDENCE, 10.

G

GENERAL AVERAGE.

See CONTRIBUTION.

GRANT.

See DEED, 7.

GUARANTY.

1. A guaranty that a demand is collectable is a conditional promise, binding upon the guarantor only in case of diligence. *Van Derveer v. Wright*, 547
2. After the guarantor of a note has been discharged, by the laches of the holder, there is no moral obligation to pay it, and he can not be again made liable, even upon an express promise. *ib*
3. A person who guaranties a note is in no sense a party to the note. *Ellis v. Brown*, 283
4. A guaranty is a special contract, and must be specially declared on. *ib*
5. The law will not imply a contract of guaranty when the evidence shows that the defendant undertook to be bound only as indorser. *ib*

6. When parties have agreed upon an express contract, the court will not imply one of a different legal effect and obligation. *Per GRIDLEY, J. ib*

See PROMISSORY NOTES, 1, 9.

H

HABEAS CORPUS.

1. The office of a writ of *habeas corpus* is to inquire into the ground upon which any person is restrained of his liberty, and, when it is found that the restraint is illegal, to deliver him therefrom. *The People v. Kling*, 366 *ib*
2. In the case of a child too young to be capable of determining for itself, the court or officer assumes to determine for it, and in doing so, the welfare of the child is chiefly, if not exclusively, to be had in view. *ib*
3. Upon *habeas corpus* to determine as to the custody of an infant, all the court is bound to do, *ex debito justitiæ*, is to set the infant free from improper restraint. Whether it will deliver it over to any body is left to its discretion. *ib*
4. And whether the court, or officer, exercises that discretion wisely, or not, is a question which can not be reviewed upon certiorari. *ib*

HIGHWAYS.

1. To give commissioners of highways jurisdiction of proceedings to lay out a highway, an application must be made to them, in writing, by a person liable to be assessed for highway labor. *Harrington v. The People*, 607
2. And an order directing the laying out of a highway, made by a county judge on appeal from a decision of such commissioners, must recite the making of such an application to the commissioners. Otherwise the order will not be conclusive evidence of the regularity of the proceedings for laying out the road. And unless the facts necessary to give the commissioners of highways jurisdiction are proved, *aliunde*, such order will not be evidence for any purpose. *ib*
3. On an indictment for an assault and battery committed in resisting persons

entering upon certain premises to open and work a highway, the defendant may prove that the alleged highway was laid through his orchard of 4 years' growth without his consent. *ib*

HUSBAND AND WIFE.

1. A bill can not be filed by husband and wife jointly, against the trustees of the wife's separate estate, appointed under her father's will, for the purpose of removing the trustees; to have an account from them; and to have the estate of the testator distributed agreeably to the will. *Sherman v. Burnham*, 404
2. Where the wife's separate estate is held by trustees in trust for the wife for life, with remainder to her child, the entire beneficial interest is in the wife and her child, and the husband has no interest therein. *ib*
3. A bill filed against the trustees, for an account of the wife's separate estate, and asking for the removal of the trustees, should be filed by the wife alone, by her next friend, making her husband a party defendant. *ib*
4. The child of the wife, who is entitled to the estate in remainder, is a necessary party to such a bill. *ib*
5. Where a suit is brought by the husband, in the names of himself and wife, it is his suit only, and will not be absolutely binding on the wife, or prejudice a future claim by her, in respect of her future estate. *ib*
6. If the objection that a bill thus filed is the bill of the husband alone, is not made in the answer, or by demurrer, but only on the hearing, and not at the first opportunity, the court usually disregards the objection; especially where the matter demanded is a specific sum which the court may order to be secured for the use of the wife, and thus protect her interest, and at the same time fully protect the paying party in obeying the decree of the court. But in a case where the separate estate of the wife is to be ascertained by an account, the court will give effect to the objection, in order fully to protect the accounting party against a subsequent independent claim of the wife. *ib*

7. A voluntary purchase, by the husband, in the name of his wife, will be fraudulent as against antecedent creditors, in like manner as if the settlement was of property actually vested in the husband. *Watson v. Le Row*, 481
8. The mutual stipulations and grants of the parties to an ante-nuptial contract, in favor of each other, are alone sufficient to give validity to the provisions of the instrument. *De Barante v. Gott*, 492
9. Where it was stipulated, in an ante-nuptial contract executed in France, that in case of the death of the wife without leaving children, her husband surviving, the real estate of which she should die possessed in the United States, should be immediately sold, and the proceeds remitted to her husband; *Held* that this provision operated as a *grant* to the husband, contingent upon the death of the wife, to which effect was to be given upon the principle of equitable conversion. *ib*
10. *Held also*, that upon the death of the wife without leaving children, the husband became entitled to have her real estate in the state of New-York sold, and the proceeds remitted to him. And the ante-nuptial agreement not having appointed a trustee to carry that object into effect, and the heirs at law of the wife being infants, *held further*, that a court of equity had power to appoint a trustee to sell such real estate and remit the proceeds to the husband. *ib*
- by him, the party indemnified, in order to recover, must show damage, and that involuntarily sustained. *Crippen v. Thompson*, 533
2. The damage must have been suffered or paid by compulsion—by some proceedings *in invitum* against the party indemnified. *ib*

INDICTMENT.

See ASSAULT AND BATTERY, 2.

INJUNCTION.

1. To authorize an injunction there should be not only a clear and palpable violation of the plaintiff's rights, but the rights themselves should be certain, and such as are capable of being clearly ascertained and measured. *Olmsted v. Loomis*, 152
 2. A general denial of fraud, by a defendant, can not be urged successfully against an order for an injunction, where facts are admitted from which the court, or a jury, may properly infer a fraudulent intent. *Vreeland v. Blunt*, 182
 3. The injunction in such a case should be retained until final judgment. *ib*
- See JURISDICTION, 1, 2, 3.
VENDOR AND PURCHASER, 8, 9.

INSURANCE.

1. Under a policy of insurance against loss or damage by fire, where one of the conditions of insurance is that the insurers will be liable for "fire by lightning," the underwriters are not liable for the destruction of the dwelling house insured, by its being rent and torn to pieces by lightning without being burnt or consumed. *Babcock v. The Montgomery Mutual Ins. Company*, 637
2. Unless there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable. There must be a fire, or burning, which is the proximate cause of the loss. *ib*
3. The practice and usage of other insurance companies, restricting their liability to losses occasioned by actual burning by lightning, may be re-

I

IMPLIED CONTRACTS.

1. The law will not imply a contract of guaranty, when the evidence shows that the defendant undertook to be bound only as indorser. *Ellis v. Brown*, 282
2. When parties have agreed upon an express contract, the court will not imply one, of a different legal effect and obligation. *Per GRIDLEY, J. ib*

INDEMNITY.

1. Upon a mere indemnity to save another harmless from a bond executed

sorted to, to show what the general usage is in regard to losses or damages caused by lightning. *ib*

J

JUDGMENT.

1. A judgment or other security may be taken and held for future responsibilities and advances to the extent of the amount of the judgment or security. But to enable a creditor thus to hold a judgment or other security it must be a part of the original agreement that the judgment shall be a security for such responsibilities and advances. *Averill v. Loucks*, 19
2. It can not, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties. *ib*
3. Where a mortgage or judgment is taken for future responsibilities or advances, *it seems* that it will not cover further responsibilities or advances, as against an incumbrance of a third person obtained intermediate the judgment or mortgage and such further responsibilities and advances. *ib*
4. Where a bond and warrant of attorney are given as a security for existing and future responsibilities, to continue until the judgment to be entered up on such bond and warrant shall be cancelled of record, the creditor has a right to hold such judgment as a security for any future responsibility assumed by him, until the same is cancelled of record. Until it is thus cancelled, the judgment, under such agreement, does not become *functus officio*, although there may have been a time, subsequent to the giving of the bond and warrant, when there was no liability on the part of the creditor, and no indebtedness from the debtor, to him. *ib*
5. The supreme court, as a court of law, has always exercised an equitable jurisdiction over judgments entered up by confession, on bonds and warrants of attorney. *ib*
6. And upon an application for relief, in such cases, the court will receive parol evidence in relation to the extent and object of the bond and warrant, and the consideration thereof. *ib*
7. The lien of a judgment does not attach, in equity, upon the mere legal title to land, existing in the defendant, when the equitable title is in a third person. *ib*
8. And if a purchaser under the judgment has notice of the equitable title, before his purchase and the actual payment of the money, he can not protect himself as a bona fide purchaser. *ib*
9. A judgment or mortgage may be taken to cover future liabilities and advances. *Truscott v. King*, 346
10. The person taking such security will be protected, whether the arrangement appears on the face of the papers, or rests in parol. *ib*
11. A judgment may be confessed to R. S. W. to cover future advances to be made by R. S. W. & Co. *ib*
12. Where a subsequent mortgage creditor files a bill to set aside such judgment, and alleges that it was confessed to secure R. S. W. for future advances made by him, and the answer does not allege that any other person than R. S. W. was interested in such security, the plaintiff can not avail himself of the variance. *ib*
13. A judgment to cover future advances was docketed 14th of October, 1835, a mortgage to another creditor was recorded 16th of October, 1837, after which date most of the unpaid advances by the judgment creditor were made. *Held* that the recording of the mortgage was not constructive notice to the prior judgment creditor: and *held also* that such judgment creditor was to be protected in his advances made after the recording of the mortgage and before he had actual notice of such mortgage. *ib*
14. A judgment for the plaintiff in an action of trespass *quare clausum fregrit*, in which the defendant pleaded *liberum tenementum*, is a bar to an ejectment for the same premises, or a portion thereof, subsequently brought by the defendant in the former suit against a person deriving his title to the land through the plaintiff in that suit. *Dunkle v. Wiles*, 515
15. And if the defendant in the second suit proves that the conveyances un-

der which he claims include the land described in the declaration in the first suit, or purport to convey all the right which the plaintiff in the former suit had, at the time of commencing that suit; and that the land for which the ejectment suit was brought is a portion of that described in such declaration, the record of the judgment in the former suit is *prima facie* evidence that the title to the land for which the ejectment suit was brought was in controversy in the former suit, and was found not to be in the plaintiff in the ejectment suit. *ib*

16. If it be proved that the land in controversy in the ejectment suit is the same land for trespasses upon which the former suit was brought, and recovery had, such record will be conclusive. *ib*

17. After a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment, as that an action of debt may be maintained upon it, with the same effect as before the statute had attached. *Carshore v. Huyck*, 583

18. In an action upon a judgment of a court of a sister state, the jurisdiction of such court may be inquired into, although the record of the judgment states facts giving the court jurisdiction. *Noyes v. Butler*, 613

See EVIDENCE, 18 to 24, 26.

MORTGAGE, 1.

SET-OFF, 2.

SHERIFF, 1.

JURISDICTION.

1. It is well established that a court of equity has concurrent jurisdiction with courts of law in cases of private nuisance. But it is equally well established that it is not every violation of the rights of another which may be ranked under the general head of nuisance, which will authorize the interposition of the equitable powers of the supreme court. *Olmsted v. Loomis*, 152

2. Such interposition rests upon the principle of a clear and certain right to the enjoyment of the subject in question; and it must also be a case of strong and imperious necessity; or

the right must have been previously established at law. *ib*

3. A court of equity will not interfere for the purpose of settling the respective rights of parties in the use of water, and determining the quantity the plaintiff is entitled to use, in propelling certain machinery; to restrain the defendant, by injunction, from drawing the water from a dike, so as to deprive the plaintiff of the use of a sufficient quantity to carry his machinery; and to protect the plaintiff in the undisturbed use of the water, where the defendant does not dispute or contest the plaintiff's rights, when the quantity of water he is entitled to shall be ascertained, but the plaintiff's rights have not been established at law. *ib*

4. It seems the plaintiff has an ample remedy at law, in such a case. *ib*

5. The want of jurisdiction in tribunals of special and limited jurisdiction can always be shown. *Harrington v. The People*, 607

6. If they do not acquire jurisdiction their proceedings are *coram non jure*, and void. *ib*

7. The party claiming under the judgment or final determination of such tribunals is bound to prove, affirmatively, the facts necessary to give them jurisdiction. *ib*

8. The jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. *ib*

9. No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends. *ib*

10. If the record of an inferior court or tribunal omits to state facts necessary to give it jurisdiction, such record, without proof of the facts *aliunde*, is not evidence, for any purpose. *ib*

11. In an action upon a judgment of a court of a sister state, the jurisdiction of such court may be inquired into, although the record of the judgment states facts giving the court jurisdiction. *Noyes v. Butler*, 613

12. No court can acquire jurisdiction by a false assertion of facts on which jurisdiction depends. *Per* PAIGE, P. J. *ib*

13. If the record of a judgment recovered in another state, alleges that at a specified term of the court the parties appeared, and that the action was continued until a subsequent term, when judgment was rendered in favor of the plaintiff, this is sufficient, *prima facie*, to show that such court acquired jurisdiction of the person of the defendant. *ib*

14. Where an inferior court has once acquired jurisdiction, it will not lose it by a subsequent error or irregularity. Accordingly held that a justice of the peace did not lose jurisdiction of a cause by erroneously adjourning it, contrary to the agreement of the parties; and that a judgment subsequently rendered by the justice was valid until reversed on certiorari. *Hard v. Shipman*, 621

See CREDITOR'S SUIT, 2, 3.
HIGHWAYS, 1, 2.
INJUNCTION.

JUSTICE OF THE PEACE.

1. A justice of the peace has jurisdiction to try an action of trespass on the case for willfully neglecting or refusing to issue an execution on a judgment recovered before the defendant as a justice of the peace. *Van Vleck v. Burroughs*, 341

2. A justice of the peace will not lose jurisdiction of a cause by erroneously adjourning it, contrary to the agreement of the parties; and a judgment subsequently rendered by him will be valid until reversed on certiorari. *Hard v. Shipman*, 621

JUSTICE'S DOCKET.

1. The statute requiring a justice of the peace, when removing from the town in which he was elected, to deposit his docket book with the town clerk, is merely directory; and his omission to do so, will not operate to the prejudice of a party, or prevent the docket from being received in evidence. *Carsore v. Huyck*, 583

2. The docket of a justice of the peace, or a transcript from such docket, of the proceedings in a suit in which the justice acquired jurisdiction of the cause, and of the person of the defendant, is conclusive evidence of the facts therein stated; and in a suit upon the judgment rendered by the justice, can not be contradicted by parol evidence. *Hard v. Shipman*, 621

L

LANDLORD AND TENANT.

See DAMAGES, 4, 5, 6.
WASTE.

LEASE.

See COVENANT, 2, 3.

LEVY.

See TRESPASS, 1.

LIBEL.

1. Where the writer of a letter, containing libellous matter, reads the same aloud to a stranger, it is a publication. *Snyder v. Andrews*, 43

2. When a charge, in a written publication, is equivocal, the construction of it is a question for the jury. *ib*

3. Where the writing complained of as libellous, is plain and unambiguous, the question, in a civil action, whether it be a libel or not, is a question of law. *HAND, J. dissented.* *ib*

4. In a civil action for a libel, or slander, the truth of the charge is a justification; but it can not be given in evidence unless it is pleaded, or notice thereof is given with the general issue. *ib*

5. Under the general issue, in an action for libel or verbal slander, any matter may be given in evidence in mitigation, which does not tend to a justification, and which falls short of it. *ib*

6. The cases on the law of libel, as to the rights and duties of the court and jury respectively, stated and explained. *ib*

7. To impute to a professional man ignorance, or want of skill, in a particular transaction, is not actionable. To be actionable, words of that character must be spoken or written of him generally. *Garr v. Selden*, 416

8. But words imputing to a lawyer a want of integrity, whether they are used generally of his profession, or particularly as to some one transaction, are actionable. *ib*

9. Accordingly held actionable to charge an attorney with revealing and disclosing confidential communications made to him by his client, for the purpose of aiding and abetting another person, with whom he has combined and colluded, and of injuring his client. *ib*

LIEN.

1. Where land is sold under a judgment, and the surplus moneys are brought into court, creditors having liens upon the land, subsequent to the judgment, have the same liens upon the surplus moneys which they had upon the land, previous to the sale. *Averill v. Loucks*, 470

2. Their liens are transferred from the land to the surplus; and such surplus must be applied in discharge of the liens, according to the order of their priority. *ib*

See EQUITY.

LIGHTNING.

See INSURANCE.

LIMITATIONS, STATUTE OF.

1. The statute of limitations begins to run against an action of trover, from the time of the conversion. *Kelsey v. Griswold*, 436

2. Promissory notes, for which an action of trover was brought, were delivered to the defendant as collateral security for an advance of exchange, on the 9th of March, 1837. On the 23d of August, 1838, after he had been repaid that advance, but while

he still had the notes in his hands, a demand was made upon him, and he refused to deliver them up. *Held* that under the circumstances, this was a conversion, and that an action of trover must be brought within six years from the time of such conversion. *ib*

3. *Held also*, that after the statute of limitations has commenced running against such an action, by a demand and refusal, the case will not be taken out of the statute by a second demand and refusal made within six years, but after the defendant has parted with the property. *ib*

4. Where the operation of the statute of limitations is avoided by a new promise, the *old demand*, and not the *new promise*, must be the foundation of the action. *Carshore v. Huyck*, 583

5. As the new promise does not, as in the case of a promise to pay a debt discharged under the insolvent act, create a new liability upon a new contract, but merely removes the presumption of payment which the statute of limitations raises, it is immaterial to whom the promise is made. *ib*

6. Making partial payments is sufficient to take the demand, upon which such payments are made, out of the operation of the statute. *ib*

7. After a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment, as that an action of debt may be maintained upon it, with the same effect as before the statute had attached. *ib*

See EVIDENCE, 32, 33.

M

MALICIOUS PROSECUTION.

1. To sustain an action for a malicious prosecution, the plaintiff must show that the prosecution originated in the malice of the defendant, without probable cause. *Hall v. Snydam*, 83

2. Proof of express malice is not enough, without showing also the want of probable cause. *ib*

3. What amounts to probable cause. *ib*

4. The question of probable cause does not turn on the actual guilt or inno-

- cence of the accused, but upon the belief of the prosecutor, concerning such guilt or innocence. *ib*
5. The want of probable cause can not be inferred from express malice, but malice may be implied from the want of probable cause. *ib*
 6. The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged, to show probable cause, or the contrary, are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. *ib*
 7. Where there is a conflict of evidence, and the credibility of testimony is to be passed upon, it is proper for the judge to submit it to the jury to find whether the facts relied on as evidence of probable cause, or of the want of probable cause, are true. And, if requested by the defendant's counsel, it is the duty of the judge to state to the jury his opinion, distinctly, whether probable cause is or is not established, if they find the truth of the facts relied on by the defendant as evidence of probable cause. *ib*
 8. If a party lays the facts of his case fully and fairly before counsel, and acts, in good faith, upon the opinion given him by such counsel, (however erroneous that opinion may be,) it is sufficient evidence of a probable cause, and is a good defence to an action for a malicious prosecution, or for a malicious arrest. *ib*
 9. But in such a case it is properly a question for the jury whether such party acted bona fide on the opinion given him by his professional adviser, believing that the plaintiff was guilty of the crime of which he was accused, or that he had a good cause of action against the plaintiff. *ib*
 10. Good faith merely, in making a criminal charge against another, is not sufficient to protect the party from liability. There must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person charged was guilty of the crime of which he was accused, to make out such a probable cause as will be a defence to an action for a malicious prosecution. *ib*

11. In an action for a malicious prosecution, in preferring a criminal complaint against the plaintiff, evidence that a recognizance had been taken from the plaintiff, and that an indorsement had subsequently been made upon the affidavits taken by the police magistrate, in these words, "Bail discharged, April 20th, 1843," and that an entry to the same effect was made in the book of minutes kept by the clerk of the criminal court, is not sufficient proof that there was an end of the criminal prosecution, before the commencement of the suit. *Bacon v. Townsend*, 426

MARRIAGE.

Marriage is a sufficient consideration to sustain a contract made in contemplation thereof; and such a contract will be enforced in a court of equity, upon the application of any person within the scope of the consideration. *De Barante v. Gott*, 482

MASTER'S REPORT.

1. An order to confirm a master's report of sale is not necessary, to pass the title to the purchaser. The title passes by the master's deed; and the master is authorized to convey after the enrollment of the decree, and before the confirmation of the report of the sale. *Fbrl v. Burch*, 60
2. The subsequent confirmation of the master's report relates back to the date of the deed executed by him. *ib*

MAXIMS.

1. The maxim *pendente lite nihil innovetur* prevails to the extent that whoever purchases or acquires the title to property *pendente lite*, takes it subject to any decree which may be made in respect to it, in the pending suit. *Zeiler v. Bowman*, 133
2. The rule of *respondet superior* does not spring directly from principles of natural justice and equity, except as those principles grow out of, and are connected with, principles of expediency and public policy. *Per Pratt, J. Coon v. The Syracuse and Utica Railroad Company*, 231

MONEY HAD AND RECEIVED.

See MONEY PAID.

MONEY PAID.

1. Money paid by the debtor to the creditor, to be applied on a bond and mortgage, and which the creditor omits thus to apply, but obtains a decree in a foreclosure suit for the whole amount, can not be recovered back in an action for money paid, or money had and received. *Tigleston v. Knickerbacker*, 458
2. The proper remedy in such a case is a motion to open the decree, to enable the defendant to prove his payments before the referee. *ib*
3. While the decree remains in force it is conclusive upon the parties, that the amount therein expressed is the true sum due. *ib*

MORTGAGE.

1. In July, 1837, R. executed a mortgage to the commissioners of the U. S. deposit fund, to secure the payment of a loan of \$2000. Default being made in the payment of interest, the premises were sold in February, 1841, and bid off by R. at \$2296.69. On the same day, \$2000 was again loaned to him, by the commissioners, and he executed a new mortgage on the same premises, to secure the payment; and the first mortgage was cancelled. Default was again made in the payment of interest, in 1846, and the premises were advertised and exposed to sale in February, 1847, and no bid made therefor. Intermediate the giving of the first mortgage and the date of the second, C. recovered a judgment against R., under which the premises were sold, and C. became the purchaser at the sheriff's sale, and was in possession of the premises. In an ejectment brought by the mortgagees against C.; *Held* that the right of possession was in them, and that they were entitled to recover the premises. *Com'rs of U. S. Deposit Fund v. Chase*, 37
2. *Held also*, that if R., at the time the premises were sold under the first mortgage, paid the amount of his bid in money, to the extent of the sum due

for interest, and the expenses, and gave a bond and mortgage, as a borrower, for the principal due upon the first mortgage, such loan was authorized, by the statute. and the bond and mortgage were valid; although no money was actually passed and re-passed between the parties. *ib*

3. Notice to a subsequent purchaser, or mortgagee, of a prior mortgage, must be direct and positive, or implied. A notice which is barely sufficient to put the party on inquiry is not enough. Nor is a suspicion of notice sufficient. *Fort v. Burch*, 60
4. Where a mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises, for the security of his debt, he has no equitable right to them, as against the assignee of a chattel mortgage given by the tenant to the mortgagor, to secure the payment of the rent. *Zeiler v. Bowman*, 133
5. A mortgage upon real estate binds not only the land, but the crops thereon, while growing, and until they are severed therefrom. *Gillett v. Balcom*, 370
6. And a person purchasing the mortgaged premises at a sale under a statute foreclosure of the mortgage is entitled to the crops growing thereon, in preference to a person bidding the same off at a sale subsequently made, under a decree in bankruptcy against the mortgagor, by the assignee in bankruptcy. *ib*
7. Where a debt secured by a mortgage is payable on demand, it is due immediately, and the mortgagee has a right to foreclose at any time; without making any previous demand. *ib*
8. The commencement of a suit upon the bond, or of proceedings in chancery or under the statute, to foreclose the mortgage, is, in such a case, a sufficient demand. *ib*

See FORECLOSURE SUIT.
PARTNERSHIP, 12, 13.
RECORDING ACTS.

MORTGAGE OF CHATTELS.

Although a chattel mortgage is not assignable or negotiable, at law, yet a

party taking an assignment of such an instrument acquires rights, and an interest in the debt secured and the property pledged, which courts of law as well as of equity will recognize and protect. *Zeiler v. Bowman*, 133

See FORECLOSURE SUIT, 1, 2.

N

NAVIGABLE STREAMS.

1. A stream in which the tide does not ebb and flow, and which is not navigable for boats, or vessels, or rafts, and has not been declared a public highway by statute, is not a *navigable* stream, within the meaning of the authorities, so as to subject it to the use of the public, but is altogether private property. *Munson v. Hungerford*, 265
2. And if a mill dam, situated upon a stream of that description, is injured by throwing saw-logs and spars into the stream and floating them down over the dam, the owner of such dam may sustain an action for his damages. *ib*
3. A stream, to be "navigable" so as to be considered a public highway, must furnish a common passage for the public; must be of common or public use, for the carriage of boats and lighters; and must be capable of bearing up and floating vessels for the transportation of property conducted by the agency of man. *ib*

NOTICE.

Notice to a subsequent purchaser, or mortgagee, of a prior mortgage, must be direct and positive, or implied. A notice which is barely sufficient to put the party on inquiry, is not enough. Nor is a suspicion of notice sufficient. *Fort v. Burch*, 60

See DEED, 18.
PARTNERSHIP, 7, 8.
RECORDING ACTS.

NUISANCE.

1. Although noise may amount to a nuisance, and is also actionable, yet it

must be a very special case in which real estate can be injured by a mere noise, so as to sustain an action for the injury. *Per HAND, J. Trustees of First Baptist Church in Schenectady v. The Ulica and Schenectady R. R. Co.* 313

2. That which is authorized by an act of the legislature can not be a nuisance. *Per HAND, J.* *ib*

See JURISDICTION, 1, 2.
RELIGIOUS SOCIETIES.

P

PARENT AND CHILD.

As against the mother of a bastard child, the putative father has no legal right to its custody. The mother, as its natural guardian, is bound to maintain it, and is entitled to the control of it. *The People v. Kling*, 366

PARTIES.

1. In all cases where the suit is brought for the purpose of taking a trust fund out of the hands of the trustees, or where it is for an account of the trust fund, being in fact a bill for the execution of the trust, all the *cestuis que trust* must be parties. *Sherman v. Burnham*, 404
2. Where a bill is filed in behalf of a devisee, against the trustees of the estate of the testator, praying in general terms, for an account of the estate and effects of the testator and of every part thereof, without confining the prayer to the property which has come to the hands of the trustees as such, the personal representatives of the testator are necessary parties; as they only can render the account called for. *ib*

See HUSBAND AND WIFE, 1, 3, 4.

PARTNERSHIP.

1. Taking a bond and warrant of attorney from one of two partners, for

a partnership debt, extinguishes the liability of the other copartner. The debt, as a partnership debt, becomes merged in the judgment; and the individual liability of the judgment debtor is substituted in the place of the joint liability of both partners. *Averill v. Loucks*, 19

2. Where real estate was originally purchased by one of two partners, and paid for out of his individual funds, and the only interest of the partnership in the premises is on account of improvements made thereon with the funds of the partnership, the actual interest, in the premises, of the partner advancing the purchase money—at least his individual interest therein—is liable to be sold on execution against him. *ib*
3. But *it seems* that the partnership creditors have a claim, in equity, to have the whole value of the improvements applied in payment of their debts, in preference to the separate creditors of the individual partners. *ib*
4. And the equitable interest in such improvements, chargeable with the debts of the partnership, will pass under an assignment made by the copartners for the benefit of the partnership creditors; and upon such equitable interest a judgment obtained by a separate creditor against the copartner who purchased the real estate will not, as against the partnership creditors, be a lien. *ib*
5. If improvements are made upon such property, with the partnership funds, intermediate the giving of a judgment by one of the partners as a security for future responsibilities, and the incurring of such responsibilities by the judgment creditor, the equitable interest of the other copartner to be reimbursed his share of the partnership funds applied to the making of such improvements, is prior in point of time to the lien of the judgment; upon the principle that an incumbrance which intervenes between a judgment and further advances takes priority over the latter. *ib*
6. Where, in an action against three defendants, sought to be charged as partners, only one appears and defends, the others not being served with process, or failing to appear, the latter can not object to the sufficiency of the evidence of their liability; and it is sufficient for the plaintiff to show that the defendant who alone appears and defends was a member of the firm by whom the debt was contracted, and as such liable to the plaintiff. *Van Eps v. Dillaye*, 244
7. The acts of one partner, though after dissolution of the partnership, will bind his copartners, in respect to all persons who have previously dealt with them as a firm, except those to whom actual notice of the dissolution has been given. *ib*
8. In the absence of proof of such notice, and in the absence of any thing upon the face of the contract to show that a person executing notes in the names of himself and others, as copartners, had no authority to bind the others, he will be estopped from denying the joint liability of himself and those whom he undertook to bind. *ib*
9. Where a creditor accepts the individual obligations of one of several partners, or of a third person, and thereupon gives up notes of the partnership, such obligations will not be considered as any thing more than the conditional payment of an existing debt; unless it is proved that they were agreed to be taken absolutely as payment of such debt. *ib*
10. The question in such cases, always, is whether the creditor agreed to, and did, accept the notes, either of the debtor or of a third person, as *payment* of the original debt. If he did not, the original debt is not discharged, and the remedy upon it is only suspended until the maturity of the notes received. *ib*
11. And where, after individual obligations, turned out by a partner to satisfy a partnership debt, have arrived at maturity and been dishonored, such partner voluntarily gives the creditor a new note in the name of the firm, for the amount of the original debt, this will be considered as evidence of the understanding of the parties that the substituted obligations were not turned out, or taken, as absolute payment of the partnership debt. *ib*
12. Where a partner gives a mortgage upon his separate property, to secure a partnership debt, he thereby be-

comes a surety for the firm, and is entitled to the rights and privileges of that character. *Averill v. Loucks*, 470

13. His separate creditors succeed to his rights and privileges as such surety. He, and his separate creditors, therefore, have a right to insist that the partnership property, being primarily liable, be first applied towards the payment of the debt, secured by such partner, before resort is had, for that purpose, to the separate estate of the surety. *ib*
14. And if the separate estate of the surety is first applied in payment of such debt, his separate creditors will be entitled to be subrogated to the rights of the creditor, as against the partnership fund. *ib*
15. The plaintiffs made an agreement with the defendant, whereby, in consideration that they, among other things, agreed to relinquish and surrender to the defendant that part of the mail route No. 933, between Saratoga Springs and Griswold's, and to run to and from and in connection with the defendant, their stages on said route; to deliver to the defendant's teams at G.'s all passengers transported by the plaintiffs, and to receive at G.'s all passengers brought there by the defendant's teams, and that the defendant might receipt, at Saratoga Springs, all the fare received from passengers; that the plaintiffs would keep a sufficient number of teams at G.'s to transport all passengers delivered there by the defendant, and that they would not interfere with travel on the defendant's road, &c. the defendant agreed to run that part of the road from Saratoga Springs to G.'s, in a good and sufficient manner to carry all the passengers, &c. and to deliver them to the teams of the plaintiffs at G.'s; that he would at all times have a sufficient number of teams and coaches at G.'s to receive all the passengers delivered there by the plaintiffs; *that he would receive, for his portion of the fare received from the passengers in proportion to the distance said passengers should be conveyed by each party*; that he would regularly settle up all accounts correctly between the parties monthly, and if any balance should remain in his hands, due to the plaintiffs, that he would pay the same to them forth-

with. In an action of assumpsit, by the plaintiffs, against the defendant, to recover the amount belonging to the plaintiffs, for the fares received by him from passengers, under this agreement, and which he had neglected and refused to pay over to them, the declaration not alleging that any balance was ever struck, between the parties, or that the defendant, since the making of the agreement, had promised to pay any balance; *Held*, on demurrer, that with respect to the division of the passage money, the parties were *partners*, as among themselves; and that the action would not lie. *Pattison v. Blanchard*, 537

16. One partner can not maintain assumpsit against his copartner, except upon a balance struck between them, and a promise to pay it. *ib*

PAYMENT.

See PARTNERSHIP, 9, 10, 11.

PLEADING.

1. Where, in an action brought by two or more persons, for an unlawful taking of property, the defendant answers that the plaintiffs are not joint owners of the property, that averment is *material*, and is *new matter*, requiring a reply. *Walrod v. Bennett*, 144
2. Such an allegation falls directly within the provision of section 144 of the code of procedure; and if not specifically controverted by the reply, it will be taken as true. *ib*
3. In an action by a purchaser, against the vendor, for the breach of an agreement to convey, a request or demand need not be laid specially. It is sufficient for the plaintiff to allege, generally, that the defendant was often requested to execute a deed. The omission to allege a time and place is not an available objection to the declaration, in arrest of judgment, or on general demurrer. *Carpenter v. Brown*, 147
4. Where the declaration, in such a case, alleged a refusal, and a continued refusal, by the defendant, to

executes a deed, although often requested; *Held* that such allegation both implied and excused a special request by the plaintiff, and was therefore sufficient. *ib*

5. Where the exceptions in a statute are contained in the enacting clause, and not in a proviso, the declaration in an action for a violation of the statute, must negative the exceptions. *Trustees of First Baptist Church in Schenectady v. The Ulica and Sch'y R. R. Co.*, 313

6. It is a general rule of pleading, that if the matters alledged are local in their nature, the truth of the venue is material and of the substance of the issue. *Vermilya v. Beatty*, 429

7. And if in such a case, it appears upon the face of the pleading that the venue is untrue, it is a defect which may be taken advantage of by demurrer. *ib*

See EXECUTORS AND ADMINISTRATORS, 2.

POSSESSION.

See EVIDENCE, 2, 3, 4, 5, 6.

VENDOR AND PURCHASER, 2, 3, 4, 7.

POSTMASTER.

1. A postmaster is not liable for the malfeasance or embezzlement of his clerks or deputies; and it seems that he is not liable even for their negligence. *Wiggins v. Hathaway*, 632

2. He is a public officer, or agent of the government; and as such, the rule of *respondet superior* does not apply to him. *ib*

3. A postmaster is only held to ordinary diligence in the discharge of the duties of his office. He can only be made liable for losses occasioned by a want of such diligence. And the burden of proof is upon him who alledges negligence, to establish the fact. *ib*

4. He must also show that the loss was the direct consequence of the particular negligence proved. *ib*

5. A postmaster is not liable for the contents of a lost letter, unless he has been guilty of negligence, and the loss was the consequence of such negligence. *ib*

PRACTICE.

1. Motion for a new trial.

1. Where a party moves for a new trial, upon a bill of exceptions, he must rely upon the grounds taken and the points made by him, upon the trial, and upon those only. *Staring v. Bowen*, 109

2. It is a rule applicable as well to cases as bills of exceptions, that a party shall not be permitted, on a motion for a new trial, to avail himself of an objection made on the trial, unless the ground of objection was so particularly stated as to enable the opposite party to supply, if possible, the alledged defect, or to take such steps as would secure himself against loss. *Merritt v. Seaman*, 330

3. Where, in a suit by executors, the defendant sought, on the trial before a referee, to set off an account against the testator, and it was objected to by the plaintiff, "that such proof was incompetent under the circumstances of the case," and the objection was overruled, and the set-off allowed, it was *held* that the grounds of objection not having been especially stated, a new trial could not be granted. *ib*

2. Defence, how to be set up.

4. Where a defence is a complete bar, it must be pleaded, but where it only goes in mitigation, notice must be given. *Per EDMONDS, J. McCullough v. Cox*, 386

3. Trial.

5. *Order of proof.*] Although a will of more than thirty years standing may, in the discretion of the judge, be permitted to be read as an ancient will, before proof of an accompanying possession, still it is a question as to the order of proof, in the discretion of the court, whether the possession shall be first proved or the will first given in evidence, in order that the court may be able to say whether the pos-

- session has been in accordance with the provisions of the will. *Staring v. Bowen*, 109
6. *Cross-examination.*] The right of counsel, cross-examining a witness, to inquire into collateral facts, with a view to discredit the witness, is in the discretion of the court; and the question is to be decided by the judge upon all the circumstances appearing before him. *Allen v. Bodine*, 383
7. The decision of the judge at the circuit, upon that question, is conclusive, and can not be the foundation of an application for a new trial; except in a clear case of abuse of the judge's discretion. *ib*
8. *Admitting improper evidence.*] Before the defendant will be held to have lost his rights under the pleadings, given by the code, it should appear very clearly that he waived those rights on the trial. *Walrod v. Bennett*, 144
9. The admission of evidence that is improper, without objection, is not conclusive evidence of such waiver. *ib*
10. *Further evidence.*] It rests in the sound discretion of the judge, at the trial of a cause, to admit further evidence, or not, after the trial has once closed. *Kellogg v. Kellogg*, 116
11. *Surrendering notes to be cancelled.*] Where a suit is brought upon a consideration for which promissory notes have subsequently been taken, it is sufficient for the plaintiff to surrender, or offer to surrender, the notes on the trial, to be cancelled. They need not be surrendered previous to bringing an action against the makers. *Armstrong v. Tuffis*, 432
12. *Money counts.*] In an action of assumpsit the declaration contained only the money counts, with a copy of a promissory note annexed, signed by B. and payable to the order of the defendant, and indorsed by him and one K., and a notice that the note was the only cause of action, and that such notice was a bill of particulars of the plaintiff's claim; *Held*, that the note might be given in evidence under the money counts, and that the bill of particulars did not confine the action to the claim on the note. *Spear v. Myers*, 445
13. As between the indorsee and indorser, a note may be given in evidence under the indebitatus assumpsit; on the principle that there is a privity of contract between them, created by the statute making notes negotiable. *ib*
14. *Testimony as to character of witnesses.*] It is in the discretion of a judge, or referee, to determine when testimony respecting the character of witnesses shall cease, when it may be resumed, and, under some circumstances, which party shall close the examination. And the court will not interfere with the exercise of that discretion, unless it has been abused. *ib*
15. *Motion for a nonsuit.*] A motion for a nonsuit, founded upon the objection that the plaintiff has shown no right to recover, is entirely too general and indefinite, and can not, therefore, be sustained. *Trustees of St. Mary's Church v. Cagger*, 576
16. So, if the objection is that the evidence does not entitle the plaintiff to recover under the declaration. *ib*
17. The ground relied on should be so specifically stated that the court, and the opposite counsel, may understand the real point which the defendant intends to raise. *ib*
18. *Charge to jury.*] In an action on the case for deceiving and defrauding the plaintiff, by obtaining property from him without paying for it, under pretence of a purchase, and upon false representations as to the solvency of the purchasers, it is proper to submit it to the jury to determine, upon the evidence, whether the representations alleged were made, and whether, if made, they were false, and if false, whether they were made with intent to defraud and deceive the plaintiff. *Armstrong v. Tuffis*, 432
19. Such a charge is equivalent to a direction that it is necessary there should have been a *scienter*. *ib*
4. *Setting aside verdict.*
20. The verdict of a jury should be set aside when there has been no evidence to support it. *Rathbone v. Stanton*, 141
21. When there is a disputed question of fact, and evidence has been given on both sides of such question, the court will not disturb the finding of the jury. But when upon any one question

which is decisive against either party, there is evidence on one side of such question and none on the other, and the verdict has been given for the party who has given no evidence upon the point in question, the verdict will be set aside. *ib*

22. And if the county court does not reverse a judgment of a justice, founded on such verdict, it is the duty of the supreme court to correct the error. *ib*

See AMENDMENT.
APPEAL.
CASE.
CONFESSIONS.

PREScription.

A prescription presupposes a grant. Therefore that defense is not applicable in a case where there can be no grantee. *Munson v. Hungerford*, 265

PRINCIPAL AND AGENT.

1. A principal is not liable to one agent or servant, for an injury sustained by him in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business or employment. *Coon v. The Syracuse and Utica Railroad Co.* 231

2. Accordingly *Held*, that a person in the employ of a railroad company, as a track-man, could not maintain an action against the company to recover damages for injuries sustained in consequence of being run over by a train of cars belonging to the defendants. *ib*

See PARTNERSHIP, 12, 13, 14.

PRINCIPAL AND SURETY.

Where a party signed a note as a surety for the first signer, and subsequently a third person signed it, adding to his signature the word "surety;" *Held*, in an action by the third signer of the note, against the second, to recover a sum amounting to half of the note, which he had paid to the holder, that the addition of the word "surety" to the plaintiff's name did not materially affect the rights of the parties; that

it did not constitute the plaintiff a surety as to *both* of the previous signers, but only a co-surety with the second, for the first signer; and that, in the absence of any thing beyond the face of the paper, tending to establish any other relationship between them than that of co-sureties, the plaintiff could not recover. *Sisson v. Barrett*, 199

PRIVILEGED COMMUNICATIONS.

See COUNSEL.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROMISSORY NOTES.

1. Where S. and G. made a promissory note, payable to the order of N. D. & Co., and before delivering it to the payees, the makers, at the request of N. D. & Co. procured it to be indorsed by B., who indorsed it for the accommodation of S. & G., and for the purpose of giving them credit with the payees; whereupon N. & D. took the note and advanced property thereon to the makers, and subsequently took it up, and indorsed the same to E.; *Held*, in an action upon the note, in the name of E., for the benefit of N. D. & Co., brought against B. "as a party to the note," that B. could not be made liable as *guarantor* or *maker* of the note. *Ellis v. Brown*. 232

2. *Held also*, that B. was not liable to N. D. & Co., in an action brought upon the note as *indorser* thereof. *ib*

3. A first indorser can not maintain an action against the second, "as a party to the note," either directly or indirectly. *ib*

4. Previous to the indorsement of a negotiable promissory note, the property of the note is in the payees; and until they have indorsed it to some other person, and thus transferred the legal title to him, no indorsement by such person will be operative as such, or

convey any title to the note, so as to enable the holder to sustain a suit thereon, in his own name. *ib*

5. If the payees of a note indorse the same, generally, *after* it has been indorsed by another person, they will be liable as first indorsers, and the other person as second indorser. *ib*

6. In an action by the holder of a note against the second indorser, it is a perfect defence to show that the plaintiff has paid no consideration for the note, but has received it from the payees merely to collect for their benefit. *ib*

7. Although there is a strong analogy between an indorsed note and a bill of exchange, yet an indorsee of an ordinary promissory note can not declare upon it as an accepted bill of exchange, and recover. *ib*

8. The act of May 2d, 1835, authorizing an assignee, for a valuable consideration, of a note, &c. to sue thereon in his own name when the assignor is dead, if there be no personal representatives of the assignor, or they refuse to sue, does not cover cases of mere gifts, or assignments founded upon natural love and affection, between near relatives by blood. *Van Derveer v. Wright*, 547

9. A promissory note payable to A. or order can not be assigned by parol; and if not endorsed by A., nor transferred, except by a guaranty indorsed thereon by him, a subsequent holder must bring himself within the statute, before he can sue the guarantor in his own name; particularly upon a conditional guaranty, which is properly a contract between the immediate parties thereto. *ib*

See DEBTOR AND CREDITOR, 1.
EQUITABLE ASSIGNMENT.
PRACTICE, 11.
PRINCIPAL AND SURETY, 1.

PUBLIC IMPROVEMENTS.

See ASSESSMENT.
CONSTITUTIONAL LAW.
TAXATION

R

RAILROAD.

See PRINCIPAL AND AGENT.
RELIGIOUS SOCIETIES.

RECEIPT.

See EVIDENCE, 12, 13.

RECEIVER.

1. A receiver, duly appointed in a creditor's suit, can maintain an action of trover for the property belonging to the defendants therein, without showing an assignment executed by all of such defendants. *Wilson v. Allen*, 549

2. The order for the appointment of a receiver, in a creditor's suit, followed up by a consummation of the appointment by the giving of bail, vests the personal estate and equitable interests of the judgment debtors in such receiver, as of the date of the order, without the execution of any transfer or assignment. *ib*

3. A common law receiver is a person appointed by the court to receive the rents, issues and profits of land, or any other thing in question in the court of chancery, pending a suit, where it does not seem reasonable to the court that either party should receive them. *The Chautauque County Bank v. White*, 599

4. He is appointed to protect some fund during the litigation, and has no powers, except such as are conferred by the order for his appointment, and the course and practice of the court. *ib*

See CREDITOR'S SUIT.

RECORDING ACTS.

1. By the true construction of the general repealing act contained in the revised statutes, and of the recording act of 1827 embraced in those statutes, the previous recording acts remain in force in respect to prior unrecorded deeds and mortgages; at least so far as such acts relate to the rule of priority between such deeds

and mortgages, or between them and subsequent conveyances; the former recording acts not being absolutely repealed by such general repealing act, and the recording act contained in the revised statutes not applying to previous deeds and mortgages. *Fort v. Burch*, 60

2. The registry acts are remedial, and must therefore be liberally and beneficially construed. *ib*
3. A record of a mortgage under the recording act of New-York is notice to a subsequent purchaser, but does not affect a prior purchaser or incumbrancer. The act is prospective, not retrospective, in its operation. *Trustcott v. King*, 346
4. The recording acts protect none but innocent and *bona fide* purchasers and holders of real estate. And none should be deemed *bona fide* purchasers who purchase with knowledge, or notice, of a defect in the title. *Schutt v. Large*, 373
5. The title of a *bona fide* purchaser of premises for a valuable consideration, claiming to hold the same under a regular chain of subsequent recorded conveyances, will, under the operation of the recording acts, be preferred to the title of a person claiming the premises under and by virtue of a prior unrecorded conveyance from the same common source of title. *ib*
6. But in an action of ejectment against such subsequent purchaser, the questions of *notice* to him of the prior unrecorded deed, and of *good faith*, on his part, in making the purchase, are material questions, and should be submitted to the jury. *ib*

RECOURSEMENT.

1. In an action of covenant, for rent, the defendant can not, by a plea in bar, *recoupe* his damage for breaches of covenant by the lessor. *McCullough v. Cox*, 386
2. The meaning of *recoursement* is, a reduction of the damages claimed. It is merely a partial defense, and not a complete bar. Nor can it be made a bar by an allegation that the damages which the defendant claims by way of *recoursement* exceed those claimed by the plaintiff. *ib*

RELIGIOUS SOCIETIES.

1. In an action by the trustees of a religious society, against a railroad company, the declaration alleged that the religious society had been disturbed, during divine worship on the sabbath, in the church edifice, by the noise made by the defendants in the use of their road, by which the property had become very much depreciated in value and rendered unfit for use as a church or house of religious worship, and claimed damages therefor; *Held*, on demurrer, that although the injuries complained of might amount to a public nuisance, yet that no action could be sustained by the plaintiffs as owners of the building, for the depreciation in the value thereof; the consequences being too remote. *Trustees of the First Baptist Church in Schenectady v. The Utica and Sch. Railroad Co.* 313
2. *Held also*, that if the plaintiffs could not recover on account of the depreciation of their property they could not recover at all; the congregation or society worshipping in the church, and not the plaintiffs, being the persons molested. *ib*
3. The custody and management of the real estate of a religious corporation belongs to the trustees, as such; but they can not sue for disturbing the society, while worshipping in the church edifice, by making a noise. There must be some injury to the property, immediate or consequential. *ib*

REPLEVIN.

See DECLARATIONS.
TRESPASS, 2, 4.

RESERVATION.

See DEED, 6, 7.

S

SAW-LOGS.

See NAVIGABLE STREAMS.

SCIENTER.

See PRACTICE, 19.

SET-OFF.

1. Where a defendant presents a demand as a set-off to the plaintiff's claim, which demand is legal, and proper to be allowed, if proved, and the court or jury pass upon it, and disallow it, such demand can not be set off in another suit between the same parties. *Halch v. Benton*, 28
2. The former verdict, or judgment, is conclusive, unless it is shown that the rejected claim was of such a nature that it could not legally have been allowed, in the previous suit. If it appears affirmatively that the court or jury, could not legally have allowed the claim as a set-off, the case will be taken out of the operation of the rule. *ib*
3. In a suit by an executor, upon a cause of action which arose after the death of the testator, the defendant can not set off a demand against the testator, even though it existed at the time of his death. *Merritt v. Seaman*, 330
4. This rule applies to a note given to the executor, to settle a balance due on a note belonging to the estate, where the executor declared on promises to himself only, and gave notice that the note was the only cause of action. *ib*
5. The fact that the defendants had previously rendered accounts that had been paid by the testator, raises no presumption against the allowance of the accounts attempted to be set off, consisting of previous charges, where it appears that the former were for disbursements only, and the latter for services. *ib*
6. Nor does the note in suit raise any presumption against the account sought to be set off, if it appears that the parties agreed, when the note was given, that it should not prejudice the plaintiff's claims. *ib*

SHERIFF.

1. In an action by a sheriff, upon a bond given to him by his deputy, for the faithful performance of his official duties, and to indemnify the obligee against the misconduct and defaults of the deputy, judgments recovered against the sheriff for omissions of duty by the deputy, are admissible as

evidence, to prove not only the liability of the defendants, but also the amount of that liability; where it appears that the deputy had notice of the suits against the sheriff, and an opportunity to defend them. *Kettle v. Lipe*, 467

2. Where an action, brought since the revised statutes, is instituted by *capias*, the suit is not considered as commenced until the *issuing* and *service* of the *capias*. Consequently, to charge a sheriff, in an action of debt for an escape, the writ must be actually served upon him while the debtor is off the limits. *Carruth v. Church*, 504

STATUTES.

1. The general system of legislation upon the subject matter of a statute, may be taken into view, in order to aid the construction of a particular statute relating to the same subject. *Fort v. Burch*, 60
2. The act of April 11th, 1842, to exempt certain property from distress for rent, and sale on execution, applies only to cases in which the debt was contracted after that statute took effect; and does not extend to debts contracted previous to its passage. *Vedder v. Alkenbrack*, 327
3. Accordingly held that the act did not authorize an execution issued upon a judgment recovered for the purchase price of property sold previous to the passage of that act, to be levied upon such property. *ib*

SUBROGATION.

See PARTNERSHIP, 14.

SURPLUS MONEYS.

1. Where land is sold under a judgment, and the surplus moneys are brought into court, creditors having liens upon the land, subsequent to the judgment, have the same liens upon the surplus moneys which they had upon the land, previous to the sale. *Aerill v. Loucks*, 471
2. Their liens are transferred from the land to the surplus; and such surplus must be applied in discharge of the liens, according to the order of their priority. *ib*

SURROGATE.

1. Where a creditor institutes proceedings before a surrogate, to compel payment of his demand, if the executor or administrators seek to avail themselves of the statute of limitations, they must state such defense in time to enable the creditor to meet it by proof. It is too late to do so when the cause is submitted on written points, after the evidence is closed. *Van Vleck v. Burroughs*, 341
2. In such proceedings before a surrogate, the parties ought to make statements of their claims in the nature of pleadings, in order that the parties may be apprised of the questions in issue. *ib*
3. A surrogate has no power to decide upon the validity and amount of a claim against an estate, upon the petition of a creditor praying for a decree directing its payment, when such claim is disputed by the executor, and the right of the surrogate to make such a determination is denied. *Muges v. Vedder*, 342

T

TAXATION.

1. Legitimate taxation is limited to the imposing of burdens or charges, for a public purpose, equally upon the persons or property within a district known and recognized by law as possessing a local sovereignty for certain purposes; as a state, county, city, town, village, &c. *The People, ex rel. Post, v. Mayor, &c. of Brooklyn*, 209
2. This rule excludes from the operation of the taxing power all those cases in which the expenses of laying out public squares, and of opening or widening streets; or of other like improvements, are charged upon certain persons or property in consequence of supposed benefits. *ib*

TENDER.

1. Although, as a general rule, money payable at no particular place must be tendered personally to the person to whom it is payable, yet where, on the day previous to the time when a payment upon a contract became due, the debtor made an ineffectual at-

ttempt to find the creditor, but his house was closed, and nobody at home; *Held* that a tender made at the house of the creditor, on the day, to his family, he being absent from home and out of the county, was valid; the creditor being chargeable with notice that the money would be tendered at the day, and it appearing from the circumstances, that the creditor, by his voluntary absence, &c. intended to render it impossible for the debtor to make a valid payment on the day it became due. *Judd v. Ensign*, 258

2. The cases in which a legal tender is indispensable, notwithstanding a refusal to receive the money, and a general refusal to perform the contract, on other grounds, are very few. *Per GRIDLEY, J. Bellinger v. Kirts*, 273
3. The general rule is that a strictly legal tender may be waived by an absolute refusal to receive the money; on the principle that no man is bound to perform a nugatory act. *ib*
4. Where there is a mutual obligation on a purchaser to pay or secure the purchase price, and on the vendor, to convey the property purchased, an offer and readiness to perform, on the part of the purchaser, is enough; especially where the vendor refuses to convey at all. *ib*

TRESPASS.

1. A mere levy upon personal property, by an officer, where it is not authorized by law, is, without either a sale or removal, a trespass. *Stewart v. Wells*, 79
2. To maintain either replevin or trespass it is not necessary to show an actual, forcible dispossession of the plaintiff. Any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain either action. *ib*
3. As a sheriff, by levying on goods and chattels which are not the property of the defendant in the execution is a trespasser, if the plaintiff in the execution directs the levy to be made, he is a trespasser also. *ib*
4. The officer, in such case, is the plaintiff's servant or agent, and trespass or replevin will lie against either of them. *ib*
5. In an action of trespass *quare clausum fregit*, where the defendant pleads

liberum tenementum, the plaintiff will recover if he shows a trespass committed on any part of the close described in the declaration, to which the defendant does not show title. And the defendant, although he has pleaded title to the whole, will succeed if he shows title to that part upon which he has trespassed; notwithstanding he has no title to the remainder of the close. *Per HAND, J. Duncle v. Wiles,* 515

6. And if the plaintiff shows trespasses on different parts, and the defendant proves title to some of them, the defendant will have judgment as to those parts to which he has title, and the plaintiff as to the others. *Per HAND, J. ib*
7. The plaintiff is not bound to show a trespass upon the whole premises, nor the defendant that he has title to the whole, in order to succeed; but each may succeed *pro tanto*, according to the proof. *Per HAND, J. ib*

TROVER.

1. To enable a person to maintain an action of trover by virtue of a special property in the thing taken, he must have an absolute vested interest in it. *Tutill v. Wheeler,* 362
2. Where there has been no actual conversion of property, a demand and refusal can not lay a foundation for the action of trover; unless at the time of the refusal the party has the property demanded in his possession, so that he can comply with the demand. *Kelsey v. Griswold,* 436
3. Where a person lawfully coming into the possession of the property of another has parted with the same, previous to the making of a demand by the owner, the remedy of the owner, against such person, is not by an action of trover, but by a special action on the case, or in assumpsit. *ib*

See AGREEMENT.

TRUSTS AND TRUSTEES.

1. Where a deed contains an express declaration that the conveyance is for the use of the grantee, and it is made for a good and valuable consideration, there can be no implied or resulting use or trust in favor of the grantor. *Rathbun v. Rathbun,* 98
2. It is a general rule, that the question whether a trust results or not, must

depend upon the intention of the parties. *Watson v. Le Row,* 482

3. Wherever a trust exists, either by the declaration of the party, or by intention or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. *De Barante v. Gott,* 492
4. If the persons in whom the legal estate is vested are infants, the court will appoint some proper person to execute a conveyance. *ib*

See CREDITOR'S SUIT, 1.

DEED, 4, 5.

PARTIES.

VENDOR AND PURCHASER, 1.

U

UNDERTAKING.

See APPEAL, 2, 5, 7, 8.

USER.

See DEDICATION TO THE PUBLIC.

V

VENDOR AND PURCHASER.

1. Where a contract is made for the sale of land the vendor is, in equity, immediately deemed a trustee of the vendee of the real estate, and the vendee a trustee of the vendor, as to the purchase money. And the vendee is treated as the owner of the land, and the money is treated as the personal estate of the vendor. *Kidd v. Denison,* 9
2. Under a naked contract of purchase, which is silent on the subject of possession, the purchaser acquires no right to the possession, and no right of entry will follow from it. *Kellogg v. Kellogg,* 116
3. If the purchaser, in such a case, enters in pursuance of a parol license from the vendor, the possession thus acquired is an interest in the land distinct from the interest acquired under the contract, and is subject to sale on an execution. *ib*
4. Where a person has taken from another a contract for the purchase of land, and has treated him as the own-

- er, he will not be permitted, in an action of ejectment, brought by the vendor, to set up his possession as adverse to the title of his vendor; but his possession will be deemed consistent with the title of his vendor. *ib*
5. Although, for some purposes, the entry of a purchaser upon the purchased premises is called an entry as by a tenant at will, yet the estate of the vendee can not be said to be an estate at will, or at sufferance. *Per ALLEN, J. ib*
6. Where, upon the sale and purchase of land, the vendor covenants to deliver a deed of the premises on a certain specified day, and the purchaser has paid the consideration and there is nothing for him to do as a condition precedent, the duty of the vendor, to deliver the deed on the day fixed, is absolute. He should therefore prepare the deed, and be ready to deliver it when demanded. One request, (even if any request is necessary,) is enough to put him in default. *Carpenter v. Brown, 147*
7. Under a contract for the sale and purchase of land, by which time is given for the payment of the purchase money, and the purchaser is to have the possession of the premises in the meantime, the purchaser is, in equity, deemed the owner of the premises, having the same rights as a mortgagor in possession; and the vendor stands in the situation of an equitable mortgagee. *Van Wyck v. Alliger, 507*
8. And the court will not restrain the purchaser, by injunction, from committing waste, by cutting timber upon the land; unless he does so to such an extent as to render the land an inadequate security for the unpaid purchase money. *ib*
9. The court will not grant an injunction to prevent the cutting of timber, by the purchaser, where it was stipulated in the contract of sale, that he should have the privilege of converting the timber upon the premises into lumber, for the payment of the purchase money, and there is no allegation in the bill, nor proof, that the land would not be an adequate security for the payment of the purchase money, without the timber. *ib*
10. An action can not be maintained by a purchaser of chattels, against the vendor, to recover damages for a defect in the quality of the goods, unless either a warranty, or fraud, is shown. *Carley v. Wilkins, 557*
11. No particular phraseology is necessary to constitute a warranty on a sale of chattels. Any assertion of the vendor, concerning the articles sold, if it be relied on by the vendee, and understood by both parties as an absolute assertion, and not merely the expression of an opinion, will amount to a warranty. *ib*
12. A representation made by a vendor, upon a sale of flour in barrels, that it is in quality superfine, or extra superfine, and worth a shilling a barrel more than common, coupled with the assurance to the purchaser's agent, that he may rely upon such representation, is a warranty of the quality of the flour. *ib*
13. Upon a warranty, a vendor is accountable for any defect, whether he knew it or not. Upon a representation merely, it is incumbent on the plaintiff to aver that the defendant knew the representation to be false. For without such knowledge he is not liable for damages. *ib*
14. Selling an article as of a particular character is neither a warranty nor a representation. A different rule would abrogate the maxim of *caveat emptor*, which is the rule followed in this state. *ib*
15. The principle of that rule is that the purchaser has it in his power to guard against any latent defect or deception in the article purchased, by exacting a warranty, from the vendor. The principle assumes that both parties are equally innocent, and throws the loss upon the purchaser, for his negligence in omitting to exact a warranty. *ib*
16. In an action brought by the vendee of real estate, against the vendor, for a breach of his covenant to convey the premises, the purchase money having been fully paid before, or at, the execution of the covenant, the plaintiff is entitled to recover the amount of purchase money actually paid by him, with interest thereon for a period not to exceed six years. *Fletcher v. Bullon, 646*
17. Whether, in such a case, a more stringent rule might not be adopted, and the plaintiff be allowed to recover the value of the land at the time of

- the refusal to convey, with interest from that time? *Quære.* *ib*
18. Whether the purchaser has been in the occupation of the premises at all, or whether he was in possession up to the time of the trial, is immaterial, and can not affect his right to sustain the action. *ib*

19. A breach of the contract alone entitles the purchaser to an action; and such a breach occurs when the vendor, upon request, refuses to convey the premises. *ib*

20. In such an action the defendant, under proper pleadings, may be permitted to show that a balance remains due to him upon a note given for the purchase money, and to produce and cancel the note, at the trial, with a view to a deduction of that sum, with interest, from the amount the plaintiff is entitled to recover. *ib*

See PLEADING, 3, 4.
TENDER, 2, 3, 4.

VENUE.

See PLEADING, 6, 7.

VERDICT.

The verdict of a jury upon title, in trespass, not only operates as a bar to the future recovery of damages for a trespass, founded upon the same injury, but operates also as an estoppel to any action for an injury to the same supposed right of possession. *Per WILLARD, J. Dunkle v. Wiles,* 515

See PRACTICE, 20, 21, 22.

VOLUNTARY SETTLEMENTS.

See DEED, 15, 16.

W

WAGER.

1. In an action by a party to a wager on the result of an election, against the stakeholder, to recover back the amount of his deposit, the plaintiff may succeed without proving a demand of the money before the result of the wager was known. *O'Maley v. Reese,* 658
2. Form of a special count by a party to a wager, against the stakeholder, to recover back his deposit. *ib*

3. The plaintiff may recover in such an action, under the count for money had and received. *ib*
4. The omission to refer to the statute against betting and gaming, in the declaration, is at most a formal defect, and can only be objected to by special demurrer. *ib*

WAIVER.

See COMPLAINT.
PRACTICE, 8, 9.

WARRANT.

1. A warrant of commitment, issued by a justice of the peace, upon a conviction for petit larceny, is void, unless it be directed to the officer, or class of officers, by whom it is to be executed; and will afford no protection to a constable who executes it. *Russell v. Hubbard,* 654
2. The legislature, by the section of the statute relative to warrants of commitment, issued by courts of special sessions, did not intend to prescribe a form for such warrants, or to vary the common law rule respecting them. Hence a warrant which would be good at common law, will be valid under the statute. *ib*

WARRANTY.

See DEED, 8, 9, 10, 11.
VENDOR AND PURCHASER, 10 to 15.

WASTE.

1. The doctrine of waste, as understood in England, is not applicable to a new and unsettled country. *Per PAIGE, J. Kidd v. Dennison,* 9
2. Where the whole of a farm, when leased, is in a wild and uncultivated state, with the exception of a few acres, and for the use of it the lessee agrees to pay a rent, the parties will be held to have intended that the lessee should be at liberty to fell part of the timber in order to fit the land for cultivation. *ib*
3. But this right will not authorize the lessee to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value. *ib*
4. To what extent wood may be cut before the tenant is guilty of waste, must, in an action at law, be left to the

sound discretion of the jury, under the direction of the court, as in other cases. *ib*

5. Where a tenant cuts trees upon the demised premises, not for the purpose of preparing the land for cultivation, but for the sake of the profit to be derived from a sale of the timber, he is guilty of waste. *ib*
6. Although a tenant for years may, from the commencement of his term, gradually clear up the woodland and prepare it for cultivation, yet he will not be permitted, just before the expiration of his lease, to cut down timber, upon that pretext. *ib*
7. Relief is granted, in cases of that kind, upon the same principles on which an injunction is issued to stay what is called equitable waste. *ib*

See VENDOR AND PURCHASER, 8, 9.

WILL.

A testator devised to his executors all his estate, real and personal, in trust to sell the real estate, except a house and lot in Pearl-street, and a farm. He then gave to his sister-in-law J. C., the mother of his two nieces, during her widowhood, the use of the house and lot in Pearl-street. By the 7th clause of the will it was provided that in case of the death or marriage of J. C. before the nieces should both be married or attain the age of twenty years, they, or in case of the death of either, the survivor, should have the use and occupation of the house and lot in Pearl-street. The 11th clause of the will was as follows: "In case of the death of both of my said nieces, and only one of them shall have lawful issue, I then give, devise and bequeath unto such child or children the whole of my estate, both real and personal; and I hereby require and direct my said executors, if such child or children shall be under the age or ages above mentioned, to apply so much of my estate as may be necessary for their support, maintenance and education; and until the youngest of such children shall become of age, to pay to such as shall have become of age an equal share of the income of my estate, and then to assign and transfer unto such child or children all the money then on hand, and also all the stocks and se-

curities in which any part of my estate may then be invested; and also to release unto such child or children my real estate to which my said executors may have acquired title in the management of my estate or otherwise, in trust for the devisees in this my last will and testament, whether named or not." *Held* that J. C. took a life estate in the house and lot in Pearl-street, with a contingent remainder for life, in one half, to each of her daughters. That the contingency having happened, viz. the death of J. C. before the nieces were both married or had attained the age of twenty years, their respective life estates vested. *Held also*, that the disposition which the will made of the remainder, after the death of the two nieces, was in contravention of the statute against perpetuities, and was therefore void. And that such remainder, not having been effectually disposed of by the will, vested in the heirs at law of the testator, upon the death of J. C. *De Barante v. Gotti*, 492

See EVIDENCE, 2 to 7.

WITNESS.

1. The maker of a promissory note, indorsed for his accommodation by another, is not a competent witness for such indorser, in a suit by the holder against him, unless released from costs and damages. *Bovne v. Hyde*, 393
2. An attorney has no authority, as such, to release a witness in the name of his client. *ib*
3. The mere fact that the name of a witness appears as a party upon the record is not sufficient to exclude him, if it appears affirmatively that he has no interest in the event of the suit. *Safford v. Lawrence*, 566
4. The true rule is, not that a witness shall be excluded merely because he is a party to the suit, but that a party to the issue tried shall not be examined as a witness. *ib*
5. And whenever it happens that a party upon the record is not a party to the issue upon trial, his competency or incompetency as a witness depends, as in every other case, upon the question of his interest in the event of the trial. *ib*

See PRACTICE, 14.

END OF VOLUME SIX.

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